

1 IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
2 OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
3 CIVIL ACTION DIVISION

4 FLOYD J. KENYON, SR. and FLORENCE
5 KENYON, his wife,
6 Plaintiffs,

Case No. 00-5401
Division: "D"

7 -vs-
8 R.J. REYNOLDS TOBACCO COMPANY, a
9 foreign corporation,

10 Defendants.

11 AA/

12 TRANSCRIPT OF PROCEEDINGS

13 BEFORE: THE HONORABLE HERBERT BAUMANN
14 Circuit Judge
15 TAKEN AT: Courtroom Number 5
16 Hillsborough County Courthouse
17 Tampa, Florida
18 DATE: 10 December 2001
19 TIME: Commencing at 1:30 p.m.
20 REPORTED BY: Sherrill Lynn Jackson, RPR
21 Notary Public, State of Florida
22
23
24

25 STENOGRAPHICALLY RECORDED (ORIGINAL)
COMPUTER-AIDED TRANSCRIPTION (COPY)

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FLORENCE KENYON (Plaintiff)
6 APRIL GEORGE (Paralegal to Mr. Acosta)
DAN DONAHUE (Corporate Rep. of R.J. Reynolds)
7 CHARLES WRIGHT (Technical Assistant -
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8 STEVE BERESHEIM (Technical Assistant -
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1 (1:30 p.m.) P R O C E E D I N G S
2 THE COURT: Mr. Acosta.
3 MR. ACOSTA: Yes.
4 THE COURT: Very good. Get the jury,
5 Kenny.
6 (Thereupon, the jury entered the
7 courtroom.)
8 THE COURT: You may be seated.
9 (Thereupon, the jury was seated.)

10 THE COURT: Welcome back, ladies and
11 gentlemen.

12 Ms. Parker, you may continue.

13 MS. PARKER: May it please the court.
14 Good afternoon.

15 Before our lunch break, I talked about
16 what the evidence has been on the failure to
17 warn claim, and I want to now talk about what
18 the evidence is on the other claim, on
19 cigarette design -- the design defect claim.
20 But before I start on that, I want to spend a
21 few minutes going over with you some of the
22 allegations that Mr. Acosta made this morning
23 about the conduct of my client. In
24 particular, the allegations he made that we
25 consider.

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1 Now, here's what I am trying to do
2 today, tried to do this morning. Trying to go
3 over what the evidence has been, telling you
4 what the witnesses have said, what the
5 documents have shown.

6 Mr. Acosta did not bring one single
7 witness in here to talk about these
8 allegations in our claim. Now, remember,
9 Judge Baumann has already told you what
10 Mr. Acosta says is not evidence. What you're
11 supposed to consider is what you hear, what
12 you heard from the witness stand; and the
13 documents in their entirety. Not just some
14 little tidbits, not what Mr. Acosta says.

15 I'm going to go over some of those
16 documents with you. As I do that, I want you
17 to keep in mind a few questions. Was there
18 anything about these documents that was a
19 secret that wasn't something that was already
20 publicly known? And is the information in
21 those documents something that would have made
22 a difference to Mr. Kenyon? And to the
23 choices that Mr. Kenyon made?

24 Lets go through some of those documents
25 Mr. Acosta has shown you in the case and

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1 showed you this morning.

2 The evidence as shown that, in fact,
3 far from being any type of secret, the issue
4 about smoking and health has been the most
5 public debate, the most public scientific
6 debate in the last 50 years. There have been
7 tens of thousands of publications in the
8 literature about smoking and health.

9 Smoking has been the most intensively
10 studied product -- cigarettes have been the
11 most intensively studied product. And you may
12 recall from Dr. Thomas' testimony he talked
13 about the 1964 Surgeon General's report that
14 came out -- again, 1964.

15 The report said it took the members of
16 the Surgeon General's advisory committee over
17 a year to go over all the studies because
18 there were so many of them, and that same
19 research that was going on at Reynolds was
20 also going on in colleges, and medical

21 schools, research institutions throughout the
22 United States and, in fact, throughout the
23 world, and coverage of the smoking and health
24 issue was not limited to medical journals.
25 We've already gone over the newspapers and

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1 magazines that it was covered in as well.

2 So, with that background, let's look at
3 some of these documents. Let me pull up first
4 Plaintiffs' Exhibit 1643. This is a document
5 written by Dr. Claude Teague at Reynolds. It
6 was written in 1953. It says right there what
7 the purpose of it is. He wrote the purpose in
8 the doom.

9 He said it's a general survey of cancer
10 research. And Dr. Teague cited 78 published
11 articles, published studies. Those are all
12 listed. I want you -- when you go back to the
13 witness room -- to the jury room, and you look
14 at that document, look at the back of it. All
15 of those publications are listed there in the
16 document. That's publicly available
17 literature.

18 There's no secret research or anything
19 like that cited in there. It's publicly
20 available literature. It's the same stuff
21 that's been covered in Reader's Digest that
22 you've heard about. And Dr. Teague said in
23 the document that this was speculation and
24 inconclusive. There are a number of different
25 sentences that use, we tried to pull all those

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1 out there. That's what Dr. Teague said about
2 this study.

3 He said that in that document more
4 testing is needed, the tests were
5 inconclusive, speculative. Ladies and
6 gentlemen, this is the perfect example of why
7 Mr. Acosta needed to bring a witness in. The
8 perfect example of why -- you know, he didn't
9 bring a witness.

10 There wasn't somebody that I can
11 cross-examine. There wasn't somebody that I
12 say, hey, what about the beginning of the
13 document when he said, I'm just -- I'm going
14 out looking at what's already in the
15 literature. There was no witness that I can
16 say, well, wait a minute, what was his
17 conclusion? Well, his conclusion was that the
18 testing was inconclusive, and that more work
19 needed to be done.

20 Mr. Acosta didn't bring anybody.
21 Instead he's just pulling out these little
22 snips like he showed you this morning.
23 There's more to the document. It's a perfect
24 example of why Mr. Acosta's interpretations
25 are not evidence. What the lawyers say are

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1 not evidence.

2 Let's look at another one of these
3 documents, actually two of them by Dr. Rodgman
4 he showed you this morning -- Dr. Allan
5 Rodgman at Reynolds. One was dated 1956, and

6 other one was 1959. Both of the documents
7 deal generally with the constituents of smoke.
8 By, that I mean, what was in the smoke.

9 Remember, Dr. Townsend testified that
10 Reynolds scientists had been the first to
11 publish on over half of the known constituents
12 of smoke and that's something that Reynolds is
13 justifiably proud of.

14 Let's look at that first document,
15 Rodgman 1956, and he says in there that the
16 removal of carcinogens is needed. And, ladies
17 and gentlemen, the very next document shows
18 that within the next three-year period after
19 he wrote that memo and says "hey, we need to
20 do research and we need to remover
21 carcinogens," Reynolds had conducted over 120
22 experiments using half a million cigarettes
23 (pointing).

24 Now, in connection with all of that,
25 you know, you heard some allegations in the

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1 case about one particular constituent smoke
2 called BaP, benzo[alpyrene. BaP is in smoke.
3 That is no secret, and it has been no secret.
4 It's been in Reader's Digest, 1950. It's been
5 in The Tampa Tribune, 1956. Now, of course,
6 as you heard Dr. Townsend and Dr. Thomas
7 testify, BaP is no longer considered to be a
8 problem in the smoke because it's in such a
9 small quantity.

10 But at one point in time it was
11 considered an issue. And that was public
12 information. Reader's Digest, Tampa Tribune.
13 Let's look at this other document Mr. Acosta
14 showed you from Dr. Rodgman. This is from
15 1959 (pointing). 1959, Dr. Rodgman identified
16 a polycyclic hydrocarbons in smoke.

17 And remember, Dr. Townsend showed you
18 that exact same information. It was in
19 Reader's Digest the same month. A
20 carcinogenic polycyclic in tobacco smoke.
21 That's no secret. That's not some secret
22 information that Reynolds had that wasn't out
23 in the public. Again it's another example why
24 Mr. Acosta should have brought a witness here,
25 so I could have cross-examined that witness

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1 and said, "Hey, did you know that this was out
2 in the public? This was in Reader's Digest
3 that exact same month" but he didn't do that.

4 The identification of these polycyclic
5 aromatic hydrocarbons, PAHs was also no
6 secret. For example, in 1957, it was in The
7 Tampa Tribune in an article. The evidence --
8 I'm not going to go over all the document
9 Mr. Acosta showed you. I'm just going to go
10 over those right now.

11 The evidence shows, though that
12 Reynolds has not had any type of information
13 monopoly. There's no secret that Reynolds
14 that weren't out there in the public, and, in
15 fact, Dr. Townsend testified about how
16 Reynolds scientists have participated in this

17 public debate about smoking and health in a
18 very public way.

19 Remember, I showed you these charts
20 during opening, and I went through all that
21 with Dr. Townsend. I won't go through each
22 individual thing this afternoon, but
23 Dr. Townsend went on and on and talked about
24 all the different things that Reynolds
25 scientists had done publicly, you know, like
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1 being published in all these journals and
2 being recognized, having their work recognized
3 in all these different Surgeon General's
4 reports. That's not a secret.

5 So, what's the bottom line on these
6 documents? The bottom line is there were no
7 secrets. There was no information monopoly.
8 Everyone knew that there were health risks to
9 smoking. And it may be hard to quit smoking
10 for some people. Mr. Kenyon knew that. It
11 was not a secret. It was widely reported to
12 the American people.

13 And to have the plaintiffs claim that,
14 "well, there were some scientific technical
15 bit of information that they didn't know
16 about, some medical, scientific information
17 that they didn't know about," means that -- to
18 say, well, they didn't know about that, so
19 that gives them liberty to disregard
20 everything else they knew about smoking and
21 health, and the health hazards of smoking
22 doesn't make sense.

23 Let me try to talk to you with an
24 example about alcohol -- alcoholic beverages.
25 It's common knowledge that they -- I
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1 think all of us know if you drink too much
2 alcoholic beverages, you'll get drunk. You'll
3 get intoxicated. We all know that. That's
4 common knowledge. Do we know exactly how
5 alcohol works on your brain? Do we know
6 exactly what receptors are involved? No. Do
7 we know how alcohol is manufactured? Do
8 we know exactly how much that the beer
9 companies put in of every little thing? No.

10 But we all know it's common knowledge
11 it you drink too much you'll get drunk. We
12 don't have to know all this technical
13 information to have that basic information
14 about the health risks of smoking. We don't
15 need to know exactly how nicotine may work on
16 the brain in order to know as people have for
17 centuries that for some people it's hard to
18 quit.

19 We don't need to know exactly every
20 single molecule that might be in cigarette
21 smoke to know that there are health risks to
22 smoking. People already know that.

23 So, don't let the plaintiffs argue that
24 there's some little technical information that
25 they didn't know about, and that that relieves
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1 them of the responsibility of the knowledge

2 they did have, and that's what counts. The
3 knowledge they had, the knowledge that was in
4 the community that smoking cigarettes had
5 health risks, including the risk of lung
6 cancer.

7 And that it may be hard to quit if you
8 smoke.

9 As a matter of fact, let me show you
10 the jury charge that we believe Judge Baumann
11 is going to read to you either later today or
12 tomorrow morning and it talks about hazards.
13 It says, "a manufacturer has a duty to warn
14 only when the hazards are not obvious."
15 That's all that a duty to warn about, is
16 hazards.

17 We don't have a duty to warn about
18 every single technical bit of information,
19 only about the hazards, the risks of smoking,
20 and that information was already known by
21 Mr. Kenyon and it was common knowledge in our
22 community to the public at large.

23 Now, Mr. Acosta said this morning that
24 Reynolds has acted inconsistently somehow. He
25 says, well, at the same time that Dr. Townsend
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1 said Reynolds was trying to develop a safer
2 cigarette, Reynolds was saying to the public,
3 "well, it hasn't been proven." So, Mr. Acosta
4 says "well, that's inconsistent. That shows
5 that we were being a bad company."

6 Ladies and gentlemen, that is
7 absolutely outrageous. What Dr. Townsend
8 testified to and it is absolutely undisputed
9 is that a -- a bedrock principle underlying
10 all of Reynolds' cigarette design efforts has
11 been the assumption, the premise that smoking
12 causes lung cancer.

13 Reynolds accepted that as a premise for
14 all of their work and then they tried to
15 reduce the health risk of smoking. Reynolds
16 scientists in the research department said,
17 "Okay, let's accept that that is true. We can
18 do everything we can to make a safer
19 cigarette, even though Reynolds scientists and
20 all these others in the medical and scientific
21 community said at that point in time, '50s and
22 '60s, proof wasn't conclusive under the
23 definitions of the scientific community and
24 the Surgeon General evidence.

25 What Reynolds did was absolutely the
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1 right thing to do, it is absolutely what a
2 responsible company should do. Reynolds heard
3 and knew about all these studies that had come
4 out. That's what Dr. Teague reported. And
5 as a result, Reynolds started all of this work
6 to try to reduce the risk of smoking, even
7 though Reynolds and others said it hasn't been
8 proven yet. That's being responsible. That's
9 being a responsible company.

10 These documents that Mr. Acosta has
11 showed you don't change that one bit.

12 Another document I want to go over with

13 you is the Frank Statement that we've all seen
14 in the trial. I put it up there again.
15 That's Plaintiffs' Exhibit 1. There has been
16 no evidence in this case from Mr. Kenyon that
17 he was on the witness stand that he ever saw
18 your or read it back in 1954 when it came out.

19 There's into evidence in the case that
20 he saw or read it when it came out.
21 Nevertheless, Mr. Acosta has tried to make a
22 big deal about this document. So, let me
23 address it.

24 Okay, let's look at what the document
25 says and what the evidence really shows. The

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1 document says "reports on these mouse, skin
2 painting studies. See, recent reports on
3 experiments with mice," and it goes on and
4 also talks about the statistical studies that
5 had come out. Reynolds wasn't keeping that a
6 secret. Reynolds said "in the document, hey,
7 there's these mouse skin painting studies.
8 Hey, there are these statistical studies."
9 That's no secret.

10 That was widely reported. Remember the
11 Life magazine article about the mouse skin
12 painting studies. Remember the Wynder-
13 Graham article was covered also in The Tampa
14 Tribune in 1954, and Dr. Wynder, this is a
15 man, this is a scientist, who conducted that
16 experiment. Dr. Wynder said about his own
17 work said, this study is not conclusive proof.
18 That's what he said about his own study and
19 you heard Dr. Thomas talk about that when he
20 was here on the witness stand.

21 Let's go to the next portion of the
22 Frank Statement. There's no proof that
23 cigarette smoking is -- is a cause -- is one
24 of the causes. There's no proof that
25 cigarette smoking is one of the causes.

3690

1 Ladies and gentlemen, remember that's
2 precisely what all these others were saying at
3 the time. Dr. Thomas went over with you some
4 of the authors of these studies. Dr. Levin,
5 1950, talking about his own study. Causation
6 isn't proven.

7 Dr. Schreck, 1950, talking about his
8 own study, says, "Statistical study can't
9 prove cause and effect. Sir Richard Doll from
10 England, again 1954, talking about his own
11 study, don't prove that smoking was the cause.
12 So, when Reynolds was saying that in the Frank
13 Statement, the authors of these studies were
14 saying the exact same thing.

15 And remember, again, Dr. Townsend's
16 chart. The date of the Reynolds documents and
17 the date of information from all the people in
18 the medical and scientific community that said
19 warnings weren't needed.

20 Let's go to the next portion of the
21 Frank Statement. "We believe the products we
22 make are not injurious to health." That's a
23 statement of belief. We believe. It was an

24 honestly held belief based on what they knew
25 at the time.

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1 And again, Judge Baumann, we expect
2 Judge Baumann is going to instruct you when he
3 gives you the instructions to follow as you're
4 deliberating that that's what you need to
5 follow. What did Reynolds know, medical and
6 scientific community know at that time? Not
7 based on what we know today, looking back in
8 hindsight.

9 Let's look at the document itself, too.
10 Reynolds is one of the sponsors of that
11 document, but look at what else was on there.
12 Tobacco farmers and warehouse associations.
13 There has been not one shred of evidence in
14 this case that the tobacco farmers who signed
15 that same document that Reynolds signed didn't
16 also honestly believe at the time what was in
17 the document.

18 You haven't heard one shred of evidence
19 on that from Mr. Acosta. Now, this was 1954,
20 and when the Frank Statement came out. At the
21 end of year, also dated 1954 is when another
22 document came out that Mr. Acosta told you
23 about. And that's the letter written by the
24 president and CEO to the employees of
25 Reynolds, and that's Plaintiffs' Exhibit 2054.

3692

1 First of all, what does this have to do
2 with Mr. Kenyon? It's written to employees of
3 Reynolds. Mr. Kenyon never worked for
4 Reynolds. He didn't work at Reynolds back in
5 1954. He never saw this document, but more
6 importantly, this document is entirely
7 consistent with what Reynolds said in the
8 Frank Statement.

9 The same thing that Reynolds was saying
10 in the Frank Statement to the public, although
11 Mr. Kenyon didn't see it is what Reynolds was
12 saying, the president and CEO was saying to
13 their friends and to their fellow employees
14 that they worked with. Not to consumers, but
15 to their friends and fellow employees, and
16 they're both entirely consistent. Mr. Kenyon
17 never saw the Frank Statement when it came
18 out. He never saw this letter.

19 So, he got no information from them.
20 And there's no way that anything in those
21 documents negated, the information he had
22 about smoking and health.

23 Now, the plaintiffs -- let me talk
24 about a different subject, and that's
25 advertising. The plaintiffs have tried to

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1 make a big deal about advertisements and Mr.
2 Acosta showed you some this morning.

3 And again, Mr. Acosta wants you to
4 believe that this advertising somehow relieved
5 Mr. Kenyon of the responsibilities he had as a
6 member of the public, the community who had
7 common knowledge about the health risks of
8 smoking.

9 Ladies and gentlemen, when you're
10 looking at the ads, I want to ask you again to
11 use your common sense.

12 It has been -- it is legal, and it has
13 been legal for Reynolds to advertise just like
14 other manufacturers advertise their products.
15 And there's no claim in this case for fraud,
16 and there's no claim in this case for any type
17 of misleading advertisements.

18 The fact that Reynolds exercised its
19 legal right to advertise its products doesn't
20 distract from or disrupt the common knowledge
21 that was out there in the community that
22 smoking had health risks, including health
23 risks of getting lung cancer.

24 Let's look briefly at this
25 advertisement. First of all, much of it's 40

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1 or 50 years old. And almost all of it that
2 you saw, for example, when Mr. Acosta
3 cross-examined Dr. Ford was for products
4 Mr. Kenyon didn't smoke. So, when you look at
5 the ads, ask yourself first is it for
6 something he smoked?

7 Let me talk now about the Camel and
8 Salem ads. When Mr. Kenyon was on the stand,
9 he talked a lot about "I'd walk a mile for a
10 Camel," he admitted there's no health message
11 in that. And there's a commercial for
12 Canadian beer that says I'd walk 500 miles for
13 Moulson beer. I don't know if you've all seen
14 that.

15 That's similar. Nobodies going to take
16 a health message out of that. And then the
17 Salem advertisement, This is the one
18 advertisement that Mr. Kenyon said he picked
19 out when he went over to Mr. Acosta's office
20 and went through a bunch of books of
21 advertisements. Remember when I asked him on
22 the stand. I said, isn't this the only ad you
23 picked out that you saw? Not ads that
24 Mr. Acosta's putting up, but you, Mr. Kenyon,
25 saw. This is the one.

3695

1 First of all, that slogan says nothing
2 about health. That's about taste. And
3 Mr. Kenyon admitted when I asked him questions
4 that there's no health message from that ad.

5 Mr. Acosta is arguing that when you say
6 it tastes good, that somehow it means it's
7 good for you. Again, I'm going to ask you to
8 use your common sense when you're evaluating
9 that.

10 Just because something has good tobacco
11 taste does not mean that it's good for you and
12 you can ignore everything you've ever heard
13 out in the community about the health risks of
14 smoking.

15 The second thing I want to ask you to
16 remember is slogans are everywhere. Coke is
17 the real thing. We bring good things to life,
18 GE, quality goes in before the name goes on.
19 Leave the driving to us. All of those are

20 advertising slogans, and people recognize them
21 as such.

22 Remember Mr. Kenyon when he was on the
23 stand admitted that he doesn't remember any
24 ads that said cigarettes are safe, and he
25 doesn't remember any ads that said cigarettes

3696

1 are good.

2 And also remember, you heard all this
3 about baseball players -- the baseball players
4 in the ads. Mr. Kenyon admitted, when I asked
5 him questions on the stand, that he never saw
6 any ad for baseball players before he started
7 smoking. So, those ads had nothing to do with
8 why he started smoking. He didn't even see
9 them. He admitted such.

10 Let me turn now to that second claim in
11 the case, and that is the design defect claim.
12 And that's the claim that the Reynolds
13 cigarettes that Mr. Kenyon smoked, the Camel
14 and Salem cigarettes, were somehow defective.

15 Now, it's important to remember that
16 Mr. Acosta, during the case, never put on any
17 testimony. He never criticized those
18 particular cigarettes. Instead, he's
19 criticized all cigarettes in general.

20 But what you're asked in this case to
21 decide and what's on the verdict form, are
22 only the cigarettes made by Reynolds that
23 Mr. Kenyon smoked, and those were the Camel
24 unfiltered cigarettes until 1972, when he
25 switched to Salem, when he smoked Salem

3697

1 filter.

2 But you're only being asked to decide
3 whether those particular cigarettes he smoked
4 were defective, not all cigarettes.

5 Ladies and gentlemen, it's
6 undisputed -- and when I say "undisputed", I
7 mean there's no evidence, there's zero
8 evidence to the contrary. It is undisputed in
9 this case that Reynolds revolutionized
10 cigarette design.

11 You heard Dr. Townsend testify about
12 everything that Reynolds had done. You heard
13 him talk about his colleagues, that these were
14 hard-working people, they were good people,
15 who were trying their best to create a safer
16 cigarette.

17 And Dr. Townsend told you, there's no
18 such thing as a safe cigarette. There's no
19 such thing as a safe cigarette.

20 But Reynolds has worked hard. Reynolds
21 has worked diligently to try to make a
22 cigarette safer, to try to reduce the health
23 risks that are inherent in cigarettes.

24 Knowing that cigarettes have health
25 risks, knowing that there is no safe

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1 cigarette, our society has nevertheless
2 decided that those should be legal, lawful
3 products for adults who choose to smoke.

4 The evidence is uncontradicted here

5 that Reynolds spent tremendous amounts of
6 time, money and energy on its cigarette design
7 efforts. And it's also uncontradicted that
8 Reynolds investigated every single serious
9 suggestion on what to do to create a safer
10 cigarette.

11 And you heard Dr. Townsend testify.
12 And again, it's uncontradicted that Reynolds
13 investigated thousands of different possible
14 research initiatives, trying to come up with a
15 safer cigarette.

16 And it's uncontradicted that Reynolds'
17 record in the area of cigarette design is
18 unmatched anywhere in the world. There's no
19 evidence contrary to that.

20 You heard Dr. Townsend talk about over
21 50 years of efforts by Reynolds in the area of
22 cigarette design.

23 For example, about BaP. Remember
24 Dr. Townsend showed you this chart about how
25 BaP was once thought to be a problem. Now,

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1 they don't think it's a problem anymore
2 because it is in such small amounts in the
3 cigarette.

4 Nevertheless, Reynolds did everything
5 it could to try to reduce BaP. And you can
6 see there from 1956 to 1993, this dramatic
7 reduction because of Reynolds' efforts.

8 You also heard Dr. Townsend talk about
9 the three major types of research that they
10 have done; the design efforts, tobacco
11 substitutes, things like lettuce and all
12 instead of tobacco in cigarettes.

13 You heard him talk about selective
14 reduction. Remember, that's when they went
15 in -- and he talked about all the different
16 constituents that they tried to go in and
17 remove one at a time.

18 And then the main area of research at
19 Reynolds has been in the area of general
20 reduction.

21 General reduction involves all of these
22 different techniques that Dr. Townsend told
23 you about, like reconstituted tobacco, which
24 is a Reynolds' invention; expanded tobacco is
25 a Reynolds' invention.

3700

1 And, ladies and gentlemen, this is why
2 there's been such a dramatic reduction to our
3 nicotine levels over the past 50 or so years,
4 including for Camel and Salem.

5 Let's look at Camel. This is the chart
6 Dr. Townsend showed you. And it starts in
7 1954, which is when Reynolds first started
8 keeping figures on Camel. And it goes up to
9 1972, because that's when Mr. Kenyon had said
10 he switched from Camel to Salem.

11 And as you can see from that chart,
12 because of all these different things that
13 Reynolds did, tar levels were cut nearly in
14 half and nicotine yields dropped even more
15 because of Reynolds' efforts.

16 And let's look at Salem. Similar,
17 dramatic results were achieved with Salem.
18 And I want to note in particular, most of the
19 changes, most of the design innovations were
20 already in Salem before Mr. Kenyon ever
21 started smoking them. He already got the
22 benefit of all of that work that Reynolds had
23 done over the years.
24 Those are real world accomplishments.
25 Those are things that Reynolds can and should
3701
1 be proud of.
2 But Reynolds wasn't the only one trying
3 to make a safer cigarette. Remember, the
4 federal government was heavily involved as
5 well. And you heard testimony that in the
6 late '60s, the National Cancer Institute,
7 which is one of the federal government
8 agencies, formed the Tobacco Working Group,
9 which is a group of scientists whose whole
10 purpose was to try to create a less hazardous
11 cigarette. And Reynolds scientists worked
12 with them.
13 But the federal government abandoned
14 its efforts in the 1970s. They never came up
15 with a design that they thought would lead to
16 a safer cigarette.
17 So, Reynolds wasn't alone. The federal
18 government was involved in this effort as
19 well.
20 You heard Dr. Townsend testify many
21 leading authorities encouraged and recommended
22 to Reynolds and other cigarette manufacturers
23 that one way to make a safer cigarette is to
24 lower tar and nicotine levels. Remember
25 Dr. Townsend went over this in a lot of
3702
1 detail. Well, let me go -- give you the
2 summary here.
3 These are just some of them he went
4 over. United States Public Health Service
5 said lower tar and nicotine. The FTC said the
6 same thing. Dr. Wynder and Dr. Hoffman did as
7 well. The American Cancer Society,
8 Dr. Hammond, the 1989 Surgeon General's
9 report.
10 And, again, many others said try to
11 lower tar and nicotine. That may be a way to
12 create a safer cigarette. And Reynolds
13 followed through on what all these people in
14 the public health community advocated.
15 Reynolds tried to reduce the tar and
16 nicotine level, after hearing what the public
17 health community advised and recommended that
18 we do.
19 For example, in 1957, Dr. Wynder said
20 you should try to reduce tar and nicotine by
21 forty percent. Remember Dr. Townsend showed
22 that study to you. Dr. Wynder said, try to
23 reduce it forty percent back in 1957.
24 Well, ladies and gentlemen, Reynolds
25 has reduced more than forty percent. It's
3703

1 actually sixty-six percent. You heard
2 Dr. Townsend testify about that, and that is
3 uncontradicted in this case.
4 Reynolds accomplished what the public
5 health community suggested and then went
6 beyond that.
7 Reynolds' efforts in the area of
8 cigarette design went beyond just regular
9 conventional cigarettes that burned tobacco.
10 Remember, you heard Dr. Townsend talk
11 about the efforts that Reynolds made to try to
12 develop a different cigarette that heated
13 tobacco, and that was Premier. That was a
14 massive amount of time and effort starting as
15 soon as it was technically feasible to do so
16 in the 1980s.
17 Premier was test marketed, you remember
18 Dr. Townsend told you, in St. Louis and
19 Arizona. But it failed in the test market
20 because no one would buy it. The consumer
21 said it tasted bad and it smelled worse. No
22 one wanted to smoke it.
23 But we didn't give up those
24 efforts: Instead, now we're working on Eclipse.
25 You remember Dr. Townsend talked about how

3704

1 Eclipse is currently being test marketed,
2 although it's not doing well in the test
3 markets either. This is just another example
4 of Reynolds' efforts to try to create a less
5 hazardous cigarette.
6 Since the early 1980s, just on this
7 heat burning cigarette, Premier and Eclipse,
8 Reynolds has spent over a billion dollars on
9 its research efforts.
10 Now, Reynolds is genuinely proud of the
11 accomplishments in this area that it's made.
12 Despite all of this tremendous work, despite
13 all of this dramatic reduction in tar and
14 nicotine, which is uncontradicted in this
15 case.
16 Despite all of that, the plaintiffs
17 claim that Reynolds somehow negligently
18 designed those Camel and Salem cigarettes.
19 And that they were defectively designed.
20 I've already gone over with you
21 Reynolds' unsurpassed efforts in this area.
22 That's enough right there for the plaintiffs
23 to fail to prove their case. But I want to go
24 over some of the specific issues that the
25 plaintiffs have made.

3705

1 First of all, let me go over the legal
2 definitions with the you. If you could pull
3 up the jury charge.
4 This is the jury charge that we expect
5 Judge Baumann will read to you and will give
6 to you after we finish our closing arguments.
7 The plaintiffs are required to prove
8 that the Reynolds cigarettes were in a
9 condition unreasonably dangerous to the user.
10 Those words, defective and unreasonably
11 dangerous, don't mean what you ordinarily

12 might think. Instead, they have special legal
13 meanings that Judge Baumann's going to tell
14 you about.

15 For example, unreasonably dangerous
16 doesn't mean that it's very dangerous; it
17 doesn't mean that. Instead, it means is the
18 product dangerous beyond that which would be
19 contemplated by an ordinary consumer with the
20 knowledge that an ordinary consumer has. Or,
21 whether the risks or the danger outweighs its
22 benefits.

23 Those are the two legal tests that are
24 going to be in the instructions you get. The
25 first one is called Consumer Expectations or

3706

1 Common Knowledge, and the other is called Risk
2 Utility. Let me go over that first test a
3 little bit -- in a little bit more detail.

4 Okay. That's a test that's called
5 Common Knowledge or Consumer Expectations.
6 And that was one purpose, remember, of
7 Dr. Ford's testimony, to come here and to go
8 over with you what the evidence is about
9 common knowledge.

10 The plaintiffs here cannot seriously
11 dispute that it was common knowledge for years
12 about the health risks of smoking. And that
13 that information was known in the community
14 and in the public at large.

15 And in addition, starting in 1966,
16 there have been decades of warnings placed on
17 the packages by Congress.

18 Remember what the American Medical
19 Association said in 1964 about warnings. The
20 American Medical Association said it was
21 common knowledge about the health risks of
22 smoking.

23 And remember, again, what Dr. Horne
24 said -- one of the scientists on the American
25 Cancer Society study, said in 1968, "You could

3707

1 stand on a roof top and shout, 'Smoking is
2 dangerous' at the top of your lungs, and you
3 would not be telling anyone anything they
4 didn't already know."

5 Ladies and gentlemen, there's just no
6 doubt that it was common knowledge that
7 smoking cigarettes had health risks. That's
8 the first test.

9 The second test is the one that's
10 called Risk Utility. And there is -- I
11 believe judge Baumann will tell you there's
12 seven factors there for you to consider. I
13 won't go over all of them.

14 The bottom line is, it's a balancing
15 test; the desirability of the product and its
16 risks. Everybody has to make decisions and
17 choices about how to lead their lives. And a
18 lot of times, we make those choices, even
19 though there are known health risks.

20 That's why some people drink alcoholic
21 beverages or why people don't -- some of us
22 don't get enough exercise, don't eat the right

23 foods or why we smoke cigarettes.
24 Because we get intangible pleasure and
25 benefits, we make that choice knowing that

3708

1 there are health risks. And Mr. Kenyon made
2 all those choices here. He chose to smoke.
3 The evidence is that he started smoking
4 for the same reason almost everybody else
5 does, and that's peer pressure. Remember he
6 said, his father was smoking at the time, his
7 sister was smoking at the time, his friends
8 were smoking at the time.
9 He also chose to continue smoking,
10 despite all this information he got -- got
11 about the health risks and despite the fact
12 that he said he got the message that smoking
13 had health risks, including the risk of lung
14 cancer. He got that message from headlines.
15 He chose to continue smoking.
16 He chose to change brands from Camel to
17 Salem in 1972. And then he chose to quit
18 smoking.
19 We all don't make the same lifestyle
20 decisions. This is Mr. Kenyon's decision and
21 the issue is not whether we agree with it or
22 not; that's for him to decide.
23 The issue is whether, when an
24 individual like Mr. Kenyon makes those
25 choices, when he weighs the risks and the

3709

1 benefits and he makes a decision for himself
2 to smoke, should he then come to court and ask
3 you, as the jury, to second guess him? To
4 ignore the decisions and choices he made about
5 the balancing of the risks and the benefits so
6 that he can get money damages? That's the
7 second test, the Risk Utility Test.
8 Ladies and gentlemen, under either
9 test, the plaintiffs have failed to meet their
10 burden of proof. In fact, the evidence is
11 directed to the contrary.
12 The evidence is that Reynolds worked
13 long and hard to try to create a safer
14 cigarette and that there was no safer,
15 feasible alternative to the cigarettes that
16 Reynolds manufactured.
17 Let me turn to an issue Mr. Acosta has
18 mentioned during the case and that's
19 additives. Remember Mr. Acosta talked about
20 additives they put in the cigarettes.
21 Well, it's undisputed, those additives
22 are just the same thing that are put in common
23 food products. And it's undisputed that those
24 additives were evaluated by independent
25 toxicologists.

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1 And we put into evidence and
2 Dr. Townsend told you about the safety
3 assessment on the additives of cigarettes.
4 And that independent evaluation of the
5 additives, as you can see on this screen,
6 found that the additives are not hazardous.
7 So, ladies and gentlemen, again, this

8 evidence is uncontradicted. So, what does it
9 have to do, what do those allegations that
10 Mr. Acosta's made -- what does that have to do
11 with the Camel or Salem cigarettes that he
12 smoked? Nothing.

13 Now, as I mentioned just a minute ago,
14 there is zero evidence in this case that there
15 is a safer, feasible alternative design that's
16 any better than the designed cigarette made by
17 Reynolds that Mr. Kenyon smoked.

18 Let me show you what the jury charge is
19 on that point. And, again, this is what we
20 expect Judge Baumann will read to you when we
21 finish our closing.

22 "You must consider whether there is a
23 feasible available alternative design."

24 And then Number 3 and Number 4, which
25 is what I want to talk about, "Whether

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1 plaintiff, Floyd Kenyon, would have used that
2 hypothetical product. And if he had used it,
3 whether Floyd Kenyon would have avoided his
4 injuries."

5 Ladies and gentlemen, the plaintiffs
6 have completely failed to put up any evidence
7 on that issue.

8 First of all, there's no evidence in
9 the case that there was anything wrong with
10 those Camel or Salem cigarettes. They weren't
11 broken, they weren't contaminated in any way;
12 there's no evidence of that.

13 And second, there's no evidence that
14 there was any safer, feasible design anywhere
15 in the world. There's no evidence at all that
16 Mr. Kenyon would have used some hypothetical,
17 safer alternative cigarette.

18 In fact, the evidence supports the
19 exact opposite. Because despite
20 recommendations from the American Cancer
21 Society, the Surgeon General and others in the
22 public health community, Mr. Kenyon never even
23 tried a lower tar, lower nicotine cigarette.

24 Remember, I asked him questions. And I
25 said, "You never tried Salem lights." He

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1 agreed. "You never tried Salem Ultra Lights."
2 And he agreed.

3 And, in fact, I asked him -- he didn't
4 -- and he confirmed, he didn't make any effort
5 to find out if there were any cigarettes on
6 the market that were any safer, any less
7 dangerous, than the cigarettes he was smoking.

8 So, there's no reason to believe that
9 if there were some hypothetical safer
10 cigarette out there, which there's not, that
11 Mr. Kenyon would have smoked it. He didn't
12 even try Salem Lights or Salem Ultra Lights.

13 And then the fourth point there,
14 whether the plaintiff, Floyd Kenyon's injuries
15 would have been avoid. There is zero evidence
16 from Mr. Acosta on that point. They didn't
17 offer one witness or not even one document to
18 show that there was some hypothetical

19 cigarette out there that was safer, or to show
20 that if Mr. Kenyon would have smoked it, he
21 would not have become ill. There's no
22 evidence in the case on that point. None.

23 Let me address these drawings that you
24 heard about this morning that we saw in the
25 case by Dr. Teague back from 1969. Remember

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1 those that Mr. Acosta showed you this morning?

2 So, Mr. Acosta apparently is arguing
3 that these designs are somehow a feasible,
4 safer alternative to the cigarettes that were
5 actually manufactured by Reynolds.

6 In fact, they are not. The evidence is
7 completely to the contrary. There is no
8 evidence by Mr. Acosta. Remember, he has to
9 put -- what he says is not evidence. What he
10 has to rely on is what the witnesses say and
11 what the documents say.

12 There is no evidence that these
13 drawings were in any way, technical --
14 technically or commercially feasible; no
15 evidence of that. There's no evidence that
16 such a cigarette would have been safer; no
17 evidence of that. There's no evidence that if
18 those cigarettes were even made, Mr. Kenyon
19 would have avoided his injuries; there's no
20 evidence of that.

21 In fact, the only evidence that you
22 heard on this issue came from Dr. Townsend.
23 When I showed those to Dr. Townsend, I asked
24 him, is this -- are these feasible, safer
25 alternatives?" And Dr. Townsend said, "No"

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1 and he explained.

2 And, again, this is completely
3 uncontradicted in the case. He explained that
4 once it did become technically possible,
5 technically feasible to make a different type
6 of cigarette, a type of cigarette, for
7 example, that heated tobacco instead of
8 burning it, that's when Reynolds jumped in and
9 spent over a billion dollars to try to develop
10 it. And that's what led to Premier and
11 Eclipse.

12 There's no evidence, though, that these
13 drawings were in any way feasible or safer or
14 Mr. Kenyon would have avoided his injury. And
15 that's the legal issue, ladies and gentlemen,
16 I believe Judge Baumann is going to explain to
17 you.

18 Now, also this morning Mr. Acosta said,
19 "Well, the Reynolds' cigarettes are defective
20 because they were designed to be inhaled."
21 And you heard him talk about that during the
22 trial.

23 Can a manufacturer make a tobacco
24 product that cannot be inhaled? You betcha;
25 those are cigars. And here in Tampa, there's

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1 a long history about cigars. But those are
2 not cigarettes.

3 And cigarettes are a legal, lawful

4 product that everyone knows people inhale.
5 Everyone doesn't, but most people do, as you
6 heard Dr. Townsend testify.

7 Our society has already decided that.
8 Our society has already decided that
9 cigarettes are legal. We don't have to make
10 just cigars. So, that argument by Mr. Acosta
11 is just a red herring.

12 Let me turn now to his allegations
13 about nicotine. And you heard him say again
14 this morning, Reynolds should have produced a
15 cigarette that had no nicotine, and that we
16 could have taken all the nicotine out of the
17 cigarettes.

18 You heard Dr. Townsend testify that is
19 not true. It's not possible, not even today.
20 And the plaintiffs have introduced no evidence
21 to the contrary.

22 The plaintiffs have also asserted that
23 Reynolds should have made a cigarette that had
24 a non-addictive level of nicotine.

25 Again, there's been no testimony

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1 whatsoever from the plaintiffs about that.
2 The fact is, Reynolds provides its consumers
3 with a range of products; Full Flavor, Lights
4 and Ultra Lights, the varying levels of tar
5 and nicotine. And all of those products,
6 whether they're Full-Flavored or Ultra Lights,
7 all of those products are legal.

8 Because not only has our society
9 decided that cigarettes are a lawful product,
10 they've also decided that we have a right to
11 choose what type of product, whether it's
12 Full- Flavored, Lights or Ultra Lights.

13 And again, Mr. Kenyon never even tried
14 Salem Lights, never even tried Salem Ultra
15 Lights. And other low nicotine cigarettes
16 were available in the marketplace as well, and
17 he never tried those.

18 Let me show you -- let me bring up this
19 information that Dr. Townsend told you about.
20 And Mr. Acosta mentioned again this morning,
21 well, maybe Philip Morris was able to make a
22 cigarette that had no nicotine.

23 Remember Dr. Townsend said, "Well,
24 that's not correct." And we brought in the
25 official government report, the Federal Trade

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1 Commission Report, for those cigarettes made
2 by Phillip Morris. And you'll see over there,
3 they all have nicotine, .1 level.

4 Those cigarettes, though, failed in the
5 marketplace, as Dr. Townsend explained to you,
6 because cigarettes with an extremely low level
7 of nicotine are not a feasible alternative;
8 people won't buy them. And that's undisputed.

9 Mr. Acosta is basically asking you to
10 conclude that adults shouldn't have the right
11 to choose between Full Flavor, Lights and
12 Ultra Lights. But that's like saying people
13 shouldn't be able to choose between a regular
14 coke and a diet coke or people shouldn't be

15 able to choose between the butter and
16 margarine or people shouldn't be able to
17 choose between beer and non-alcoholic beer or
18 a Big Mac versus a chicken sandwich. Those
19 are all choices that our society gives us.
20 All of these different tar and nicotine
21 level cigarettes are legal, so long as they
22 carry the warnings.
23 Those are all choices that our society
24 gives us. All of these different tar and
25 nicotine level cigarettes are legal, as long
3718
1 as they carry warnings.
2 Another one of the Reynolds product
3 design processes that Mr. Acosta has
4 criticized is reconstituted tobacco.
5 Remember, that process (pointing) that
6 Dr. Townsend talked to you about. Remember
7 Dr. Townsend had brought with him the
8 tobacco -- actually this evidence and will go
9 back with you -- the plastic bags with
10 reconstituted tobacco sheet that he passed
11 around for y'all to look at.
12 First of all, that process is no
13 secret. It was in Reader's Digest in 1957.
14 It was discussed in Congress in 1956. And it
15 was reported in the Tampa Tribune again in
16 1957. It's just a process that's used to make
17 cigarettes. And despite the allegations
18 you've heard from Mr. Acosta, the
19 uncontradicted evidence in this, it actually
20 reduces nicotine.
21 Dr. Townsend said there's less nicotine
22 in the final product after it goes through
23 this reconstituted tobacco process than if it
24 had not gone through that process.
25 Again, an allegation is one thing.
3719
1 What you heard from the witness stand, what's
2 uncontradicted testimony in the case, is
3 something else.
4 Mr. Acosta has alleged that Reynolds
5 adjusted the pH of smoke by using ammonia to
6 get more nicotine in the cigarettes. And he's
7 shown you a bunch of documents including some
8 this morning about pH and ammonia. But
9 remember, again this is uncontradicted.
10 Dr. Townsend testified that ammoniated tobacco
11 was never used -- never used in the Salem or
12 the Camel cigarettes that Mr. Kenyon smoked.
13 So, what does this have to do with
14 Mr. Kenyon? Once again, nothing. That's what
15 you're being asked to decide in the case.
16 You're being asked to decide about the
17 cigarettes that he smoked. So, if you see any
18 documents about pH or ammonia, they have
19 nothing to do with what Mr. Kenyon smoked.
20 And that is uncontradicted.
21 Mr. Acosta has also made some
22 allegations that Reynolds tried to manipulate
23 nicotine using -- by altering the tar to
24 nicotine ratio. There are some documents
25 you've seen, including some you've seen this

1 morning in there. But far from being
2 something improper that is research that the
3 public health community advocated.

4 Remember Dr. Townsend came in, and he
5 talked about all these different public health
6 scientists and groups who said, "You should do
7 this research, because that may be a way to
8 develop a safer cigarette." All these people
9 Dr. Townsend talked about have who said, "do
10 this research," and, in fact, one of those,
11 the National Cancer Institute on there
12 (pointing) -- I want to show you this
13 document. The National Cancer Institute
14 talking but this research used the word
15 "manipulation." You see there at the bottom.
16 That's their word. The National Cancer
17 Institute's word about describing this
18 research. There's nothing sinister about
19 that.

20 Then the document Mr. Acosta showed you
21 this morning that said "how low can you go?"
22 That's what it's talking about. Look at the
23 document. That's what all these scientists
24 and the government was advocating, lowering
25 and adjusting this ratio of tar to nicotine.

1 I talked about this in my opening
2 statement and I showed in my opening statement
3 the list of all the different scientists and
4 government organizations who advocated
5 research. And in my opening statement, I
6 said, I challenged Mr. Acosta to come to court
7 and explain to you if what the Surgeon General
8 said we should do, what the National Cancer
9 Institute said we should do, what the United
10 States Department of Agriculture said we
11 should document. Was that sinister? Were
12 they sinister to tell us to do that research?
13 There's not been a bit of evidence in there.
14 There's not been a shred of evidence that
15 those organizations were somehow sinister when
16 they told us to do that research.

17 But again, ladies and gentlemen, what
18 does this have to do with Floyd Kenyon?
19 Nothing. Nothing. Because Dr. Townsend
20 testified, and again it's absolutely
21 uncontradicted. This research was never put
22 in any commercial cigarette made by Reynolds,
23 including any of the cigarettes that
24 Mr. Kenyon smoked. So, what does it have to
25 do with the issues you are to you decide in

1 the case? You are to decide the issues about
2 the cigarettes he smoked. And this research
3 has nothing to do with it.

4 Mr. Acosta has asserted that Reynolds
5 has manipulated the nicotine. But the
6 evidence has shown that is not true. And to
7 the contrary, the nicotine levels have fallen,
8 they've dropped by 60 percent over the years
9 since this chart in 1954.

10 Let me talk about another topic now

11 that you heard about this morning that's
12 testing. Mr. Acosta said this morning that
13 Reynolds failed to do research and testing we
14 should have done. And he said the research we
15 did was a sham. That's what he said this
16 morning.

17 Well, ladies and gentlemen, first of
18 all, there are two purposes of testing. One
19 thing to do was to find out, is there
20 something in our product that we need to warn
21 people about? Well, people already knew.
22 Mr. Kenyon already knew, and the public
23 community at large already knew cigarettes had
24 health risks.

25 And the second reason why you do

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1 testing is to say, "Is there something we need
2 to do different in the design of our product
3 you? Is there something we need to do
4 differently result of this testing?

5 And, ladies and gentlemen, Reynolds was
6 already doing that. That's what I talked
7 about right after we started back after lunch
8 break. Reynolds assumed that the product
9 caused cancer and health risks. They assumed
10 that, and they worked diligently to try to
11 make those cigarettes safer.

12 There's nothing else that could be
13 found out in the testing that would change
14 what Reynolds was already doing. Because
15 Reynolds was a responsible company. And as
16 soon as Reynolds found out about these studies
17 that stated coming out, even though Reynolds
18 believed the proof had not yet been
19 established, Reynolds started doing that. The
20 research that Reynolds started making those
21 changes, working on design changes to its
22 cigarettes. That's a responsible company.

23 Again, let's look back at the Frank
24 Statement Mr. Acosta's shown you over and over
25 from 1954. It said; we're going to do

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1 research and testing. And ladies and
2 gentlemen we did that. We fulfilled that
3 promise that we made to the public. And that
4 was through this organization called TIRC,
5 which was -- the name was later changed to
6 CTR. And they started doing that research and
7 that testing right after they were formed in
8 1954.

9 Now, CTR funded research. They didn't
10 do the research themselves. Instead, they
11 gave the money away. They gave the funding
12 away to others for others to do the research.
13 And the first head of it back in 1950s was
14 Dr. Clarence Cook Little. He was head of
15 what's called the Scientific Advisory Board
16 that went out and decided what research should
17 be funded. You heard Dr. Ford about it.

18 Ladies and gentlemen, it's absolutely
19 uncontradicted in this case that Dr. Little
20 was a man of integrity and a giant in the
21 world of science. He was a past president of

22 the University of Michigan. He was a past
23 president of the University of Maine. He was
24 a former president of the American Cancer
25 Society back when it had a different name. It 3725

1 changed it's name later to the American Cancer
2 Society. That's who was head of this group.

3 And the grants that were made, were
4 made all across the United States. Including
5 here in Florida that you've seen about. And
6 as Dr. Goldman admitted -- remember when I was
7 questioning Dr. Goldman? I said;
8 "Dr. Goldman, you have an office at the
9 University of South Florida; that is correct?
10 Yes. Do you know these researchers? I went
11 through and I read their names. He said; yes,
12 I've heard of them.

13 I said "Dr. Goldman, do you have any
14 reason to believe that this research is not of
15 the highest quality?" And he said "no, I have
16 no reason to dispute that."

17 That was Mr. Acosta's witness. And
18 again, we showed you the very last thing in
19 our case. Mr. Fuhrman stood up and he looked
20 at the Elmo and he published the information
21 that five of our grantees had received the
22 Nobel Prize.

23 Now, are the plaintiffs seriously
24 arguing that this research is a sham? Are
25 they seriously arguing that this research was

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1 not of the highest quality and they have no
2 evidence whatsoever to the contrary?

3 That was research that was done by this
4 industry organization that Reynolds was one of
5 the ones who participated in the funding. But
6 in addition to that, Reynolds also conducted
7 its own research on the cigarettes that were
8 manufactured. And that was Reynolds biologic
9 research program. You heard about it from
10 Dr. Townsend.

11 Remember Dr. Townsend talked about this
12 four-step scientific methodology? And with
13 respect to biological testing, Dr. Townsend
14 told you about all the different types of
15 tests that Reynolds has conducted.

16 Despite Mr. Acosta's allegations the
17 evidence, what you heard from the witness
18 stand, one of the documents shows again these
19 allegations about research and testing are
20 just not true. The evidence and testimony
21 from Dr. Townsend was that Reynolds funded and
22 conducted a massive amount of research and
23 testing. And that evidence is undisputed.

24 Now, Mr. Acosta has shown you some
25 other documents throughout the case. And I

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1 just don't have time to go over every one of
2 those with you.

3 As you're looking at documents, if
4 Mr. Acosta shows you more documents this
5 afternoon, I'm going to ask yourself to keep
6 in mind some questions: First of all, what

7 does the document have to do with Floyd
8 Kenyon? Is there anything in that document
9 that was used in the cigarettes he smoked?
10 Are these documents taken out of context?
11 There was no witness to explain what the
12 document meant. Was the document a draft?
13 Was it signed? Were the documents ever
14 actually circulated? Was it actually ever
15 sent to anybody? Did Reynolds ever take any
16 action as a result of the document?

17 Mr. Acosta's only shown you a very
18 small number of the millions and millions of
19 documents that came out through Reynolds over
20 the years. In many cases all he's shown you
21 is just a sentence or two. So, when you look
22 at the documents, remember there are other
23 parts of it that may explain what Mr. Acosta
24 has read.

25 And then finally were the documents

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1 from Reynolds? A huge amount of documents
2 Mr. Acosta has shown you have been from Philip
3 Morris or British American Tobacco,
4 Brown & Williamson.

5 Before I move on, let me just make this
6 point, you need to look at the whole picture.
7 Reynolds was founded over 125 years ago in
8 1875. And since that time I couldn't stand
9 before you and say no mistakes have ever been
10 made. When a company has thousands and
11 thousands of employees and has been in
12 existence for that long a period of time it
13 would be not just surprising but it would be
14 shocking if there weren't mistakes that were
15 made. Or if there weren't some memos that
16 were written in draft form that maybe
17 shouldn't have been written. But nobody else
18 can make that claim either, that they're
19 perfect. No government can make that claim,
20 no other company could make that claim. No
21 family could make that claim. No football
22 team or baseball team could make that claim.

23 And that's why, for example, with a
24 football or baseball team, you don't look to
25 be unfair, to look at the football team by its

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1 turnovers. Or the baseball team by its
2 errors. That's because even championship
3 teams make mistakes sometimes.

4 And also for Reynolds, it would be
5 unfair to judge Reynolds without looking at
6 the whole picture.

7 As I said in my opening, if you can
8 find that Reynolds did something wrong, and
9 that what we did wrong caused damage, caused
10 illness to Mr. Kenyon, we'll take
11 responsibility. But ladies and gentlemen
12 there has been no such evidence in the case.

13 The plaintiffs should not be awarded
14 money damages for anything that didn't affect
15 Floyd Kenyon.

16 There's one more big topic I need to
17 talk to you about this afternoon, that's the

18 medical case. But before I do that let me
19 talk again about the burden of proof for just
20 a moment. The plaintiff has the burden of
21 proof. And the plaintiff has the burden of
22 proving every element of each one of their
23 claims.
24 And if I had not put on any evidence at
25 all, if Reynolds had not put on any witness or

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1 any document, the plaintiff would still have
2 to meet their burden of proof. But we did
3 call witnesses. And we did put on evidence.
4 For example, Mr. Acosta talked this
5 morning about we didn't call a doctor. He
6 said; "oh, we called Dr. Williams and
7 Dr. Goldman." Well, first of all, remember
8 Dr. Goldman didn't treat Mr. Kenyon. He never
9 even met him. He didn't examine him. He
10 didn't even know who he was. Hadn't even read
11 his deposition.

12 He said -- Mr. Acosta said; well,
13 Dr. William and Dr. Goldman were going on
14 their rounds and seeing patients. And we
15 brought a toxicologist who wouldn't go see the
16 patients or the patients wouldn't listen to
17 what the toxicologist had to say.

18 Well, ladies and gentlemen, what the
19 treating doctor like Dr. Williams did is the
20 treatment. He treats. His job is to treat
21 Mr. Kenyon. And there's been no issue at all
22 in this case about the quality of treatment
23 that he's received. There's no question about
24 that.

25 Same thing with Dr. Goldman. He is a
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1 treating physician. Although he never saw
2 Mr. Kenyon. They don't deal with issues of
3 causation. They rely on studies done by
4 people like Dr. Thomas. They rely on the
5 toxicologist. He heard Dr. Thomas talk about
6 all the different studies he had conducted
7 himself, and that he had supervised, including
8 the time he was in Washington working for the
9 federal government.

10 That's who doctors rely on. Because
11 the doctors don't have -- they don't do that
12 research. They're treating patients, which is
13 exactly what Dr. Williams was doing here with
14 Mr. Kenyon.

15 Before I talk about the medical case,
16 let me show you one of the jury charges that I
17 believe Judge Baumann is going to tell about.
18 That has to do with sympathy. And the
19 instruction is that you're not to be swayed
20 from your duty by sympathy or prejudice for or
21 against any party.

22 So, I urge you as you're deliberating
23 and you're considering the evidence to focus
24 on the facts. Your decision in this case
25 should be based on the facts as you heard them

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1 from the witness stand and from the documents.
2 And, of course, it's always unfortunate

3 when someone has cancer. And we are sorry
4 that Mr. Kenyon is ill, but that's not the
5 issue in the case. So I want to spend a few
6 minutes now talking about the medical issue
7 that is in the case.

8 And you heard me say in opening, and we
9 have not disputed it at any time throughout
10 the trial that some lung cancer is associated
11 with smoking. You heard Dr. Townsend say his
12 personal view was it may cause cancer,
13 particularly to some individuals. And he said
14 Reynolds view was that cigarette smoking may
15 cause lung cancer. And you heard during the
16 trial that the scientific and medical
17 community has had different definitions of the
18 word "cause." The Surgeon General has used
19 the word differently, scientists have used the
20 word differently. And over the years there's
21 been a debate about how much evidence is
22 required to prove causation.

23 There have been with two main
24 definitions that have been used by the
25 scientists. The first one is what was in --

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1 is what's called the classic definition. And
2 if you pull up the screen here, the 1964
3 Surgeon General's report did not use that
4 definition. That's what Dr. Thomas explained.
5 So, the first definition, the classic
6 definition, that is absolute sense, that was
7 not used by the Surgeon General.

8 Under the classic definition, you do
9 need statistics, and I'll talk about the
10 statistics in a minute. But you also have to
11 have an animal model. And you heard
12 Dr. Thomas say -- and I believe this was in
13 response to a question from one of the jurors,
14 one of you, that even today, science has not
15 developed an adequate animal model on
16 inhalation.

17 You heard Mr. Acosta this morning talk
18 about Auerbach Beagles. Well, ladies and
19 gentlemen, you also heard from Dr. Townsend
20 and Dr. Thomas that the Surgeon General in
21 both '64 and '82 did not use those studies.

22 From this classic definition you also
23 need to know what is in the smoke that causes
24 the problem. And Dr. Townsend explained;
25 well, there are a lot of probable -- that's

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1 how they're defined by this organization
2 called IARC -- they're probable human
3 carcinogens in tobacco smoke. There's
4 possible human carcinogens in tobacco smoke.
5 They're animal carcinogens in tobacco smoke,
6 but nothing that is on the list of known human
7 carcinogens has been identified even today in
8 tobacco smoke. We just don't know that. And
9 that's undisputed.

10 And then finally under this classic
11 definition of cause, you need to know the
12 mechanism or how -- how cigarettes cause lung
13 cancer. And you heard even Dr. Goldman,

14 Mr. Acosta's witness say, the mechanism was
15 not known. And if he had discovered it, he'd
16 get the Nobel Prize.

17 But beginning in 1964 the Surgeon
18 General used a different definition. And
19 again these are not Reynolds definitions,
20 these are scientific community's definition.

21 Starting in 1964 the Surgeon General
22 said it would be a different definition. And
23 that's what Dr. Townsend called the "relaxed
24 definition of cause". And under that public
25 health definition that was used by the Surgeon

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1 General in 1964, the strong statistical
2 association is enough. Even if you don't know
3 how it -- the mechanism or what the carcinogen
4 is, under this new definition statistics are
5 enough to show cause in the population.

6 And by the way, with respect to
7 emphysema, even in -- even under this relaxed
8 definition, the 1964 Surgeon General's report
9 said that they couldn't conclude that
10 emphysema was caused by smoking.

11 We agree, Reynolds agrees, that
12 cigarette smoking is statistically associated
13 with lung cancer. And those statistics are
14 very strong. We don't dispute that. But
15 statistics cannot and do not prove cause in an
16 individual. Dr. Williams agreed with that.
17 And Dr. Goldman agreed with that as well.

18 I don't mean to minimize the strength
19 of the association, the strength of the
20 statistics, but what's important is statistics
21 are not enough to show cause in an individual
22 human being. Statistics are used for the
23 population as a whole.

24 You have to look at the person. And
25 there's no test that can be done. And again

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1 Dr. Williams and Dr. Goldman agreed, there's
2 no test that can be done to determine whether
3 or not a particular individual's lung cancer
4 was or was not caused by smoking. There just
5 isn't such a test available.

6 The issue here is not whether smoking
7 causes lung cancer in general. The issue here
8 is not whether smoking causes lung cancer in
9 some other people. The only issue -- the only
10 medical issue is whether smoking caused
11 Mr. Kenyon's lung cancer and Mr. Kenyon's
12 emphysema. And again, statistics are not
13 enough.

14 Remember, you heard -- and again this
15 is undisputed in the case -- non-smokers get
16 lung cancer. Dr. Thomas said tens of
17 thousands of people who never smoked get lung
18 cancer every year, including people who have
19 small cell lung cancer. And I do remember, as
20 we all do, the testimony from Dr. Williams and
21 Dr. Goldman about whether they had ever seen
22 any of their own patients who had small cell
23 lung cancer who had not smoked.

24 But remember Dr. Williams acknowledged

25 and Dr. Goldman said he had never heard of it 3737

1 so he just didn't know. This big study that
2 was done here in Tampa at the University of
3 South Florida that over 35,000 smokers. And
4 that study found that there was no difference
5 in the proportion, including for small cell
6 lung cancer.

7 It's also been undisputed that most
8 smokers never get lung cancer. For heavy
9 smokers, 90 percent of 'em never get lung
10 cancer. And for light to medium smokers, 99
11 out of a hundred don't get lung cancer. And
12 those statistics are undisputed. Mr. Acosta
13 put on no evidence to the contrary.

14 It's also undisputed that there are
15 other risk factors for lung cancer besides
16 just smoking. And you heard those in the
17 case. And heard Dr. Williams, who was
18 Mr. Kenyon's treating doctor. You heard him
19 say he had not evaluated -- he never evaluated
20 Mr. Kenyon to determine whether or not any of
21 those other risk factors were present.

22 Dr. Goldman, remember, never met him,
23 never examined him, never even read his
24 deposition transcripts. Dr. Goldman doesn't
25 know him.

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1 Remember, you heard in the case about
2 genetic testing, but there's something called
3 genetic testing like one example was this P53
4 testing that you heard about. That can be
5 done to determine whether or not a person has
6 these genetic mutations. But no testing was
7 done here. And again that's undisputed.

8 So ask yourself, why didn't the
9 plaintiffs do that genetic testing when it
10 would have provided more information for you?
11 Remember, the plaintiffs have the burden of
12 proof here. The plaintiffs must prove that
13 Mr. Kenyon's lung cancer was caused by
14 smoking. It's not enough for them just to
15 say; smoking causes lung cancer in general.
16 They have to prove that smoking, in fact,
17 caused Mr. Kenyon's own lung cancer.

18 So, let's look at that issue.
19 Remember, Mr. Kenyon's smoking history and the
20 different versions of it. Remember, during my
21 opening statement, I said, there are three
22 different versions you're going to hear about
23 during the trial. This was the first version.
24 This is what Mr. Kenyon said before he filed
25 the lawsuit. He said "I smoked from 1946

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1 until 1982." That's what he told his doctors.
2 That's what he put on his life insurance
3 applications. That's what he told his family.

4 And so, then he filed the lawsuit, and
5 we took his deposition, you heard him admit on
6 the stand, "Oh, I smoked all the way from
7 1992". He said; "I smoked from one to two
8 packs a day up until 1992. That was the
9 second version.

10 But then when we got all these medical
11 records and all these life insurance
12 applications, then he comes up with the third
13 version. That's when he says "oh, well in
14 1982, I cut back. I cut down to practically
15 nothing, one or two or three cigarettes a
16 day."

17 Let's look at the evidence in this.
18 Mr. Kenyon's wife, Mrs. Kenyon, testified that
19 Mr. Kenyon quit from 1982. And she said she
20 had no reason to think that he was smoking
21 after then.

22 His sister, remember we took -- the
23 videotape deposition of his sister out in
24 Texas and we played that. Her name was Jeanne
25 Fife. Remember his sister testified that he

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1 told her in 1982 that he quit smoking. In
2 fact he bragged about. She said she quit.
3 And he said, "hey, I quit six week before you
4 did". Back in 1982. And his sister also said
5 that once a year they would get after -- from
6 to '82 to '92 they would get together. She
7 would see her brother about once a year. And
8 she said she never had any reason to think at
9 any time between '82 to '92 that he was still
10 smoking. She thought he had stopped smoking,
11 too.

12 Remember his daughter, Stephanie Meyer,
13 who took the stand and testified. She said as
14 far as she knew, Mr. Kenyon stopped smoking in
15 1982. Remember she said that there was a six
16 week period of time in 1986 when she and her
17 husband moved back home with her parents. And
18 she said even though smoke bothered her and
19 she didn't like it on her clothes, she didn't
20 smell smoke. She didn't think that there was
21 any reason to believe that her father had not
22 quit smoking in 1982. That was his daughter.
23 In fact, no one can verify that Mr. Kenyon
24 continued to smoke after 1982.

25 Then there are the medical records.

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1 All these medical records that he had filled
2 out where he said he quit in 1982.

3 Now, I want to talk about one of them
4 in particular that Mr. Acosta showed you this
5 morning. And I think it's a perfect example
6 of why you need to look at the whole document
7 instead of just a little snippet that
8 Mr. Acosta reads to you.

9 Mr. Acosta put up this one document,
10 and he said; oh, 50 years. He was smoking 50
11 years. That means he was still smoking in
12 1982. Look at the rest of that line. The
13 rest of that line Mr. Kenyon said he quit 17
14 years ago, which should have been the '82
15 to -- '82-'83 time period. So, look at the
16 whole document.

17 And heard Mr. Kenyon testify that he
18 would never lie, is the word he used -- he
19 would never lie to his doctors, because he
20 knew they needed to know information so that

21 he could have the correct treatment.
22 Then we showed you the life insurance
23 applications on both forms, two different
24 insurance companies. He denied smoking
25 cigarettes in the last 12 months.

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1 During that period of time he now says
2 he was smoking. And Mr. Kenyon admitted when
3 I asked him questions when he was on the stand
4 that he had an obligation to tell the truth to
5 those life insurance companies.

6 But despite all this evidence
7 Mr. Kenyon says he really didn't quit in 1982.
8 And he has given us three totally inconsistent
9 reasons why.

10 First of all, he said, well, he didn't
11 want to disappoint his family. "I didn't want
12 to disappoint my family. I told them I quit
13 in 1982, and I didn't want them to know I
14 couldn't do it, so I didn't want to disappoint
15 them." But Mr. Kenyon said his wife never
16 asked him to quit. And he denied that he ever
17 told his family that he quit.

18 So, he said, "I told my family I didn't
19 want to disappoint them." And he also said,
20 "I didn't tell my family." You heard both of
21 that from the witness stand.

22 The second reason he gave about why he
23 didn't -- explanation about why the medical
24 records and life insurance policies are not
25 consistent with what he now claims. He says,

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1 "Well, that was what was accurate in his
2 mind." He said, "Well, in my mind, I was a
3 non-smoker from '82 to '92," but now that he's
4 filed this lawsuit, in his mind, he was a
5 smoker.

6 And the third thing he said is, "Well,
7 on the one hand," he said, "well, often didn't
8 realize I was even smoking. A lot of times
9 I'd just light up unconsciously and wouldn't
10 even realize I was smoking."

11 On the other hand, when Mr. Acosta
12 asked him questions when he was trying to
13 prove that he was addicted Mr. Kenyon knew all
14 sorts of detail. He said, "Oh, I smoked in
15 the morning. I smoked last thing at night."
16 He had all sorts of details. So, on one hand
17 he said while smoking unconsciously, on the
18 other hand he says I know all sorts of detail.
19 Again, you've got inconsistent testimony.

20 Ultimately, you are the trier of fact.
21 And you are going to have to decide what the
22 truth is.

23 There are three versions of his smoking
24 history. And Mr. Kenyon has given us
25 testimony that would cover any possibility.

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1 Let's look at the summary. All of this
2 information about 1982 he quit, where he told
3 his wife, his sister, his daughters, his
4 doctors, his life insurance companies, and
5 that's he said before he filed the lawsuit.

6 And after he filed the lawsuit, it's just
7 Mr. Kenyon.
8 Why did he change his story?
9 Ladies and gentlemen, let me now spend
10 a few minutes and talk to you about what the
11 evidence has shown about risk reduction. If
12 Mr. Kenyon had stopped smoking in 1982, that
13 was 18 years before he was ever diagnosed with
14 lung cancer or emphysema.
15 And it's undisputed -- in fact,
16 Dr. Goldman and Dr. Williams agreed,
17 Mr. Kenyon did not lung cancer or emphysema in
18 either 1982 or even in 1992. And the studies
19 showed that your risk of getting lung cancer
20 from cigarettes would have dropped back down,
21 either all the way to the level of someone who
22 had never smoked or almost to the level of
23 someone who had never smoked.
24 Remember all those studies from the
25 1990s and recently that say that. That's what
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1 the 1990 Surgeon General report says. That's
2 what the American Medical Association said.
3 That's what the Joint Committee on smoking and
4 health said. That's what the National Cancer
5 Institute said. That's what Harvard Nurses
6 said he said, that's what the 2000 Surgeon
7 General's report said.
8 And, ladies and gentlemen, remember I
9 showed Dr. Goldman the Web site just from that
10 week, which I guess now is about two weeks
11 ago, from the American Cancer Society, from
12 the American Lung Association that said the
13 same thing. Once you quit smoking for 10 to
14 15 years, your risk goes back to the down to
15 the level of someone who has never smoked.
16 Those studies are just overwhelming.
17 After 10 to toe 15 years, the risk drops. And
18 Dr. Williams agrees with that. I asked him
19 that question. He agreed.
20 And, also, the evidence is Dr. Williams
21 did not evaluate Mr. Kenyon for risk
22 reduction. There's no evidence -- in fact,
23 again one of questions I believe from one of
24 the jurors, one of you, Dr. Williams did not
25 evaluate Mr. Kenyon for alternate risk factors
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1 or risk reduction. And even Dr. Goldman
2 admitted that your risk drops. He just
3 wouldn't agree with how much.
4 Now, Mr. Acosta said this morning "Risk
5 reduction doesn't matter because he got lung
6 cancer." So risk reduction doesn't matter.
7 Ladies and gentlemen -- and he says, "Who
8 cares? Who cares about risk reduction because
9 he got lung cancer doesn't apply."
10 Well, ladies and gentlemen, you should
11 care about risk reduction, because that goes
12 to the burden of proof.
13 After 10 to 15 years, your risk as a
14 former smoker is the same as the level of
15 someone who had never smoked. So, if your
16 risk is the same as someone who has never

17 smoked, how can Mr. Acosta meet his burden of
18 proof to prove that Mr. Kenyon's lung cancer,
19 the issue you have to decide before you, is
20 caused by smoking?

21 Let's look at that chart. Do we
22 have -- this is the risk for current smokers.
23 That doesn't apply to Mr. Kenyon, because even
24 under his version, he quit in 1992. This is
25 what Dr. Thomas showed you.

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1 Look at the difference between someone
2 who has never smoked and someone who quit for
3 10 to 15 years.

4 So, how can Mr. Acosta meet his burden
5 of proof given that Mr. Kenyon's risk is right
6 about the same as someone who had never
7 smoked?

8 Ladies and gentlemen, that's why the
9 Surgeon General tells people you should quit
10 smoking, it's not too late. That's why
11 doctors tell their patients, "You should quit
12 smoking, it's not too late." It's not too
13 late, because after a period of time, the
14 genetic changes and the cellular damage is
15 repaired. It goes away.

16 And you heard that lung cancer is a
17 latent disease. That means it takes a number
18 of years to develop. And you heard what
19 Dr. Thomas said. And, again, it's just
20 uncontradicted. Risk reduction stops that
21 latency period. At first it just slows it
22 down, so after this 10- to 15-year period it
23 cuts it off.

24 Again, use our common sense. That's
25 what the Surgeon General tells people. That's

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1 what doctors tell people, quit smoking, your
2 risks will go down. That's what happened with
3 Mr. Kenyon, and that's why the plaintiffs
4 can't prove that his lung cancer was caused by
5 smoking. It was 18 years from when he quit in
6 1982 until 2000 when he was diagnosed with
7 lung cancer and emphysema.

8 And you're going to have to decide
9 whether you believe Mr. Kenyon in the light of
10 all of this information, but I will ask you
11 this: One thing that you won't have to
12 decide, because it's uncontroverted here, is
13 Mr. Kenyon changes his story. He even admits
14 that. Mr. Kenyon said one thing before he
15 filed his lawsuit, and he's saying something
16 else now. So what I want to you ask you is,
17 don't let Mr. Kenyon use his change in story
18 to his advantage to get money damages in this
19 lawsuit.

20 And keep this in mind also: What if
21 Mr. Kenyon had quit smoking in 1954, which is
22 when he said he first heard about the risk of
23 smoking, which is when he first made his quit
24 attempt.

25 If he quit smoking in 1954, his risk of

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1 getting lung cancer from smoking would have

2 been back down to nothing or the level of
3 someone who had never smoked. Same thing if
4 he quit in 1964 when the Surgeon General's
5 report had come out, his risk would have gone
6 down. Or if he quit in 1966 when the
7 government warning went on the packages, his
8 risk would have gone down.

9 Mr. Kenyon had the power and the
10 ability to reduce his risk at all those points
11 in time, but he didn't do it. He chose to
12 continue smoking with the knowledge about all
13 the health risk that he knew and that the
14 public knew.

15 Now, let me talk to briefly with you
16 about the issue of emphysema. Two issues
17 there. One is you risk reduction. And the
18 other is that his doctors, who tested him,
19 based on these tests, said emphysema wasn't
20 shown.

21 First of all, Dr. Goldman even admitted
22 risk reduction applies to emphysema. So, you
23 need not go any further on that issue.

24 And Dr. Goldman and Dr. Williams told
25 us as well about these tests. And that's why

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1 Reynolds didn't need to call a witness. I was
2 able to ask questions of Dr. Goldman and
3 Dr. Williams on this issue.

4 Here's what they said: "We all know
5 Mr. Kenyon is on oxygen. He's been on oxygen
6 for sleep apnea before he was ever diagnosed
7 with lung cancer or emphysema.

8 Dr. Williams acknowledged that fact and
9 Dr. Goldman testified that Mr. Kenyon's sleep
10 apnea was caused by his weight, not caused by
11 smoking. Again, that's what Dr. Goldman
12 admitted on the stand.

13 Now, Mr. Acosta keeps showing all these
14 radiology reports. Talked about CT scans. He
15 showed those this morning. These radiology
16 reports talk about emphysema and COPD. No
17 question about it.

18 But here's what's important.
19 Dr. Goldman and Dr. Williams both said you
20 cannot diagnose emphysema based on radiology.
21 Remember they said the goal standard was
22 pathology. That's where you go in and you
23 have a tissue sample and a pathologist put the
24 tissue sample under the microscope and they
25 look under the microscope and say whether they

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1 see emphysema or not. It's undisputed here
2 there's no pathology that shows emphysema.
3 That's the goal standard.

4 And then Dr. Williams and Dr. Goldman
5 both said, when you don't have pathology, the
6 next best thing or what's called PFT,
7 Pulmonary Function Test, and he did have
8 Pulmonary Function Tests. They were
9 administered by one of Dr. Goldman's
10 colleagues, Dr. Walsh who is at Moffitt.
11 Dr. Walsh is the person who is head of the
12 pulmonary function laboratory. You heard that

13 during the trial.
14 And those tests took place in May of
15 2000. And there's a medical record that
16 says -- from Dr. Walsh that says that
17 Mr. Kenyon had an undocumented history of COPD
18 or emphysema. Undocumented means they hadn't
19 done the tests. They hadn't shown whether he
20 had it or not. So, Dr. Walsh did those tests.
21 And those test were after the radiology report
22 Mr. Acosta's told you about.

23 Radiology is April and May 3rd. The
24 pulmonary function test was April 3rd -- I'm
25 sorry, May 30th.

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1 So, Dr. Walsh administered these tests.
2 And Dr. Walsh did not find emphysema or COPD.
3 He said Mr. Kenyon had something called
4 restrictive disease, which is something
5 totally different. He never said, excuse me,
6 emphysema or COPD after he did those tests.

7 Mr. Kenyon had those tests again in May
8 of this year. He repeated -- Dr. Walsh
9 repeated those tests again and again. Did not
10 say in any of these records, emphysema or
11 COPD. Dr. Walsh, the doctor who did the
12 tests. And Dr. Williams agreed, when I have
13 asked Dr. Williams. Dr. Williams agreed that
14 no pulmonary function test showed emphysema.

15 Now, Dr. Goldman tried has just tried
16 to disregard all that. Even though
17 Dr. Goldman has never seen Mr. Kenyon, never
18 treated him, never met him. Dr. Goldman said,
19 "Oh, I interpret these tests differently. I
20 think he did have it."

21 So I want to make sure y'all
22 understand, there are medical records that say
23 emphysema or COPD, but those are either the
24 medical records of the radiology reports that
25 all these doctors say radiology is not enough,

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1 or there's records of his undocumented
2 history.

3 Dr. Walsh's records are the one that
4 are important. He's the doctor who did the
5 tests. And Mr. Acosta didn't bring him here,
6 even though Mr. Acosta has the burden of
7 proof.

8 I want to emphasize again, risk
9 reduction. Risk reduction applies to
10 emphysema. And that's another reason why the
11 plaintiffs cannot meet their burden of proof.

12 Finally, I want to address this
13 allegation that Mr. Kenyon was addicted to
14 smoking. Two key points there: There's no
15 claim for damages based on addiction. And
16 Mr. Kenyon quit. Those are the two key points
17 about addiction.

18 You know, you heard from the trial
19 there are all sorts of labels that have been
20 used. Addiction or dependence or habit. And
21 those definitions have changed over time, from
22 not Reynolds changing the definitions, but the
23 Surgeon General has changed definitions. The

24 Surgeon General used one definition in 1964
25 and said, "Cigarette smoking is not

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1 addictive." and then the Surgeon General used
2 a different definition in 1988 and said
3 cigarette smoking was addictive. Those are
4 different definitions from the Surgeon
5 General. It is not Reynolds changing
6 definition. It's the public health community.
7 The Surgeon General. But it doesn't matter
8 what you call it. Whatever you call it, the
9 key question is, can people quit? Smoking
10 behavior is whatever it is regardless of the
11 behavior.

12 Nicotine occurs naturally in tobacco.
13 That's common knowledge.

14 It's common knowledge that cigarettes
15 have tobacco, contain nicotine. It's common
16 knowledge that nicotine plays a role in
17 smoking behavior, and it's been common
18 knowledge for centuries that for some people
19 it's hard to quit. But the question is, can
20 people quit? And the answer is yes.

21 Once people have sufficient motivation
22 and sufficient determination, people can quit.
23 Mr. Kenyon's father quit. Mr. Kenyon's sister
24 quit. And Mr. Kenyon quit. 50 million
25 Americans have quit. And 90 to 95 percent of

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1 those have quit without any assistance, just
2 like Mr. Kenyon did.

3 Let's talk about the evidence in this
4 case. Let's talk about the evidence about
5 Mr. Kenyon. He quit. Undisputed. But
6 Dr. Goldman says that Mr. Kenyon was addicted.

7 Remember, Dr. Goldman never even met
8 him, never even read his depositions. The
9 only thing that Dr. Goldman knew is what he
10 said Mr. Acosta told him.

11 Dr. Goldman compared Mr. Kenyon's use
12 of nicotine to cocaine and heroin use. Ladies
13 and gentlemen, use your common sense.
14 Mr. Goldman -- Dr. Goldman didn't even know
15 that Mr. Kenyon had said his only withdrawal
16 symptoms were he became edgy and short, and he
17 ate pistachio nuts, and started eating them.

18 And Dr. Goldman testified that he could
19 not say that someone who had never made a
20 serious quit attempt was addicted. And
21 Mr. Kenyon has admitted he never told a doctor
22 he was addicted until he filed this lawsuit.

23 Mr. Kenyon never made a serious effort
24 to quit smoking until 1982. He never even
25 gave up cigarettes for any period of time. He

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1 said the longest he ever went without a
2 cigarette while he was trying to quit was one
3 day.

4 He never talked to his father to find
5 out how his father quit. He never talked to
6 his sister to find out how his sister quit.
7 He never used any type of medication to try to
8 quit smoking. He didn't go to a doctor to try

9 to seek help on how to quit smoke. He didn't
10 see a psychologist or psychiatrist. He didn't
11 get any type of professional counseling to try
12 to quit smoking. He didn't seek hypothesis to
13 try to quit. He didn't go to a stop smoking
14 clinic. He didn't go to any type of stop
15 smoking support group. He didn't contact any
16 public health authority the American Cancer
17 Society or the American Lung Association to
18 get information on how to quit. He didn't
19 even throw his ashtrays away. And, ladies and
20 gentlemen, he didn't even throw his cigarettes
21 away.

22 Remember, he said he kept 'em in his
23 pocket while he was trying to quit. Until
24 1982 when he first threw his cigarettes away,
25 he tried to quit, and that's when he was able

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1 to do it.

2 Now, according to Mr. Kenyon in 1982
3 that's when he cut down. He cut down from one
4 or two or maybe three packages of cigarettes a
5 day to one or two or three cigarettes a day,
6 that's what Mr. Kenyon says.

7 How is he able to do that?

8 Willpower, that's what he said. He
9 simply made the choice in 1982 and he acted on
10 it.

11 And according to you his own testimony,
12 he was able to do that virtually overnight, as
13 soon as he put his mind to it.

14 What motivated him?

15 What gave him the motivation to make
16 the commitment to quit in 1982?

17 Was there some new revelation?

18 Was there some new information?

19 Was there something that happened in
20 his life?

21 No.

22 You heard what he said on the stand. I
23 asked him, "What event or events happened in
24 1982 that gave you the motivation to quit?"

25 He said, "Nothing." He just made up

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1 his mind.

2 It was simply a choice that he had not
3 made before.

4 And, again, all this that you've heard
5 about Mr. Acosta about addiction, what does it
6 have to do with Floyd Kenyon?

7 Nothing.

8 He has no claim in the case based on
9 addiction, and he quit.

10 So, ladies and gentlemen, that brings
11 us to the verdict form.

12 Your Honor, may I show this to the
13 jury?

14 THE COURT: You may.

15 MS. PARKER: Ladies and gentlemen, we
16 expect this to be verdict form that you'll
17 get.

18 And the first page of it is just a
19 cover sheet. And then there are four

20 questions that you'll have to fill out.
21 There are two questions on failure to
22 warn, and there are two questions on design
23 defect.
24 What I'd like to ask is when you answer
25 those questions, you answer them no, and then

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1 you'll stop there with your verdict.
2 Again, I'm going to ask you to keep
3 your focus on Floyd Kenyon and keep your focus
4 on the choices that he made. Remember to use
5 your common sense as you're evaluating the
6 evidence and you're making your deliberations.

7 What Mr. Acosta says, what he argues,
8 can't substitute for the facts. Can't
9 substitute for the facts that you've heard
10 from the witness stand and the facts that are
11 in the entire documents.

12 So, look with me, if you will, up at
13 this again. We talked about that during the
14 jury selection, Mr. Acosta mentioned it this
15 morning. I don't know if y'all can see from
16 where you're sitting, but that's Lady Justice,
17 and she has on a blindfold.

18 And the fact she has on a blindfold is
19 one of the most important parts of our justice
20 system. What it means is your deliberations,
21 your verdict, should be based on nothing but
22 the weight of the evidence. Lady justice is
23 blindfolded so she can't see the parties. She
24 can't see if a party is sympathetic or
25 unsympathetic. She can't see if the party is

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1 popular or unpopular. She can't see if a
2 party is an individual or a company. She
3 can't see any of that because the verdict
4 should be based on the weight of the evidence
5 alone.

6 Now, I'm going to finish up in just a
7 few minutes, but Mr. Acosta will have another
8 chance to talk to you. And that's because he
9 has the burden of proof in the case.

10 When you listen to Mr. Acosta talk
11 again this afternoon, listen and see if he
12 answers these questions: Since Mr. Kenyon has
13 admitted that he's seen hundreds of newspaper
14 and magazine articles back in the '50s and the
15 '60s saying smoking can cause lung cancer,
16 what possible warning could Reynolds give that
17 would be needed besides that that would alert
18 Mr. Kenyon to the possibility of that message
19 he had gotten.

20 And if Mr. Kenyon ignored this massive
21 publicity about smoking and health because he
22 wasn't interested in it, because he didn't
23 think it applied to him, what possible warning
24 could Reynolds give so that Mr. Kenyon would
25 realize that it did apply to him.

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1 And Mr. -- if Mr. Kenyon was not aware
2 of the risks of smoking before 1969, why did
3 he quit -- try to quit smoking in 1954 when he
4 says he realized that smoking had health

5 risks?
6 And if Mr. Acosta shows you any more
7 documents, ask is that a Reynolds' document?
8 Is it a draft?
9 Was it signed?
10 Was it circulated?
11 Did anybody act on it?
12 What does the rest of the document say?
13 What did documents from other tobacco
14 companies have to do with the Camel and the
15 Salem cigarettes that you're asked about in
16 this case?
17 Ask yourself if Mr. Acosta answers
18 these questions: What are all these design
19 modifications?
20 They're never incorporated -- and
21 research never incorporated in the cigarettes
22 Mr. Kenyon smoked.
23 What do they have to do with the case?
24 For example, all these documents
25 Mr. Acosta keeps showing about pH and ammonia,
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1 nicotine manipulation, how are they relevant
2 to Mr. Kenyon when that information was not
3 put in his cigarettes?
4 If all cigarettes cause lung cancer,
5 which is what Mr. Acosta is arguing, how in
6 the world is it possible for anyone to ever
7 make a safer cigarette that Mr. Kenyon would
8 have chosen to smoke and that he would not
9 have developed lung cancer if he had done so?
10 Why should you believe that Mr. Kenyon
11 would have smoked to a no -- zero nicotine
12 cigarette or a low nicotine cigarette when you
13 heard him testify he never even tried Salem
14 Lights, he never even tried Salem Ultra
15 Lights?
16 And if it was the nicotine in the
17 cigarettes that kept Mr. Kenyon smoking, why
18 was it he was able to quit when he was still
19 smoking those same cigarettes?
20 The deliberations that you're going to
21 have to -- you're going to have to start later
22 on today or tomorrow morning, are going to
23 demand the best of all of you, and you're
24 going to be working together as a group, but I
25 also want you to say, keep -- respect your
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1 individual convictions as well. Remember, you
2 all are individuals, as well as trying to work
3 as a group. And we're confident that you're
4 going to be fair, just as we've seen how
5 diligent you've been over the last few weeks,
6 and the patience that you've shown and how
7 hard you've worked on the case.
8 Before I close I want to express our
9 appreciation again for your willingness to
10 serve in the case. If it weren't for people
11 like you serving as jurors, we wouldn't have
12 the justice system that we have in the world
13 today, and we thank you for that.
14 I've tried during my time talking to
15 you to address all of the points that I think

16 Mr. Acosta has tried trying to make. If I've
17 missed something, don't let my silence mean
18 that I agree with it.

19 But I hope more importantly what I
20 tried to do in my time talking with you is to
21 go over the evidence, to review with the facts
22 are in evidence here. And I've tried to
23 fairly summarize for you what that evidence
24 has been.

25 I want to leave you with one final

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1 thought, and this is personal choice. Mr. --
2 the testimony from Mr. Kenyon was that he
3 always believed smoking was a matter of
4 personal choice.

5 And you've heard him say that he never
6 talked to his children about smoking, because
7 he thought that was something that's up to
8 them to decide.

9 Remember, I asked him about the time
10 when his daughter Stephanie was in high
11 school, and he saw an open package of
12 cigarettes in her bedroom. And he said he
13 made said the decision not to talk to her
14 about smoking at that point, even though you
15 they had seen the cigarettes there in the
16 room, because he said he thought that was a
17 choice she had to make herself.

18 And Mr. Kenyon testified that he never
19 interfered with any of these father's
20 decisions, about his father smoking, because
21 he thought those were decisions that his
22 father had to make himself. And he testified
23 that he never interfered with any of his
24 sister's decisions about smoking because he
25 thought again those were decisions for his

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1 sister to make. He didn't want to infer.

2 And he testified that he didn't want
3 anyone to interfere with his own decisions
4 about smoking. And Mrs. Kenyon testify the
5 same thing. Mrs. Kenyon testified smoking was
6 his thing, and they accepted it, and she
7 didn't interfere with his choices.

8 Let me leave you with Mr. Kenyon's own
9 words. Mr. Kenyon has made those choices. He
10 made those choices knowing full well
11 personally about the health risks of smoking.
12 He also make those choices as part of your
13 community with full knowledge of the community
14 about the common knowledge of the risks of
15 smoking, but despite having now made all those
16 choices, Mr. Kenyon has come into court and is
17 trying to get money damage from us.

18 Ladies and gentlemen, when you go back
19 to deliberate, remember what Mr. Kenyon said.
20 Remember his own words. "Everything you do
21 you in life is a choice for yourself."

22 Ladies and gentlemen, thank you again
23 for your attention this afternoon.

24 Your Honor, that will conclude my
25 closing.

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1 THE COURT: Thank you, Ms. Parker.
2 Ladies and gentlemen, we will take a
3 15-minute break.
4 (Thereupon, the jury exited the
5 courtroom.)
6 THE COURT: Court will be in recess for
7 15 minutes.
8 (Thereupon, a recess was had from 3:20
9 until 3:40 p.m.)
10 THE COURT: You ready, Mr. Acosta?
11 MR. ACOSTA: Yes, I am.
12 THE COURT: Ms. Parker?
13 MS. PARKER: If Mr. Acosta's going to
14 use the screen again, can I go ahead and move
15 over?
16 THE COURT: You may.
17 Go ahead.
18 (Thereupon, the jury entered the
19 courtroom.)
20 THE COURT: You may be seated.
21 (Thereupon, the jury was seated.)
22 THE COURT: Welcome back.
23 Mr. Acosta, you may proceed.
24 MR. ACOSTA: Ladies and gentlemen, you
25 might have heard something that I didn't --
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1 don't think that the word "choices" came out
2 of Ms. Parker's mouth as they relate to
3 Reynolds. They made choices, too; that
4 Reynolds had responsibilities, too.
5 And that's why we're here. We're here
6 about the choices that Reynolds made, things
7 that Reynolds did. We're not here about
8 things Mr. Kenyon -- they don't claim that
9 Mr. Kenyon's negligent. They don't claim
10 that.
11 We claim that Reynolds was negligent
12 for the choices that they made, and we can
13 explain the choices that Mr. Kenyon made,
14 because what he was given as a choice between
15 rumors that he heard or saw in headlines and
16 what Reynolds said and what he knew the
17 message was; and he testified he knew what the
18 message was.
19 You saw him on the witness stand, and
20 you saw him being questioned about the
21 different things he said at different times;
22 and I think there were seven different
23 transcripts of deposition testimony, which
24 they drew out a question here or a question
25 there. And sure, he was asked, "Do you
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1 remember reading this statement?" or, "Do you
2 remember reading that statement? Do you
3 remember" -- well, going back that long,
4 memory is not so sharp, but the thing he did
5 remember, he has been consistent on, because
6 he remembered the message from Reynolds. He
7 remembered how they presented their cigarettes
8 to him. He remembered knowing that he didn't
9 think that it caused cancer. Dates are a
10 little bit difficult for him.
11 The testimony that we recall -- and use

12 your own memory on this. He tried to quit
13 smoking after the caution label came out in
14 the late 1960s. That's when he tried to quit
15 smoking. Don't know where this 1954 stuff
16 came from. From this witness stand, it wasn't
17 something -- but you use your own memory about
18 that. You may have had even a note or
19 something, but we dispute that, believe that
20 testimony was that by 1954 he thought he was
21 addicted to cigarettes; but when he really
22 tried to quit and began to try to quit was
23 1969.

24 And the claim for addiction -- that's
25 not a claim to compensatory damages. But all

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1 this evidence about addiction is evidence for
2 to you consider, because it explains why he
3 kept smoking. It's the addictive nature of
4 the cigarette that causes a person to keep
5 smoking. They don't have a choice where they
6 can just say, "Nope. I'm just going to put it
7 down and never pick it up again." Maybe some
8 do. Maybe some do. I shouldn't say "never,"
9 because there are definitely people that do,
10 and we know that there are 50 million people
11 that quit smoking since 1970 or something like
12 that. Of course, we don't know how many of
13 them have died from emphysema or lung cancer
14 or some heart disease or some other
15 cigarette-related illness. We don't know how
16 many of them were just short-time smokers for
17 a year or two.

18 What we're talking about in this
19 situation, it's a dose response kind of
20 relationship between nicotine and the
21 dependence that it causes. The more you
22 smoke, the more dependent you get. By the
23 time people started realizing how significant
24 nicotine was, it was too late, and all the
25 testimony about pH and ammonia and all of

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1 that -- it's in the documents -- the reasons
2 for all that is to demonstrate to you the
3 significance of nicotine to this industry, to
4 the cigarette companies.

5 Their whole -- their whole deal was the
6 nicotine business. It wasn't tobacco; it was
7 a drug business. And that's why we had that
8 document in from Brown & Williamson where
9 their vice president said, "We're in the
10 nicotine business."

11 And then I showed you a number of
12 documents from Reynolds from Dr. Teague. You
13 may recall -- in fact, I called Dr. Townsend
14 Dr. Teague a number of times. It was a
15 mistake. Dr. Teague is the one that started
16 in the research department way back in 1953
17 that wrote that initial document that had
18 researched all those skin painting studies
19 that had showed all the cancer in all those
20 animals and had done the research on the
21 statistical studies.

22 And in that document, if you read it

23 carefully, much of that information was only
24 available through abstracts. He couldn't even
25 get the original work. So, yes, maybe it was 3771

1 available publicly, but it was obscure stuff.
2 You had to be a scientist to find that stuff
3 out. He was a Ph.D., and they hired him to do
4 that.

5 Now, they expected that the consumer,
6 the person that buys the cigarette, is
7 supposed to know more about it than they do?
8 They're the experts, not Mr. Kenyon, not the
9 millions of other smokers that smoked back
10 then. Reynolds was the expert.

11 Sure, there was Reader's Digest. You
12 heard Dr. Ford talk about that; that from 1924
13 to 1969, I guess, there were three dozen
14 articles in Reader's Digest on smoking, less
15 than one a year -- less than one a year. And
16 then, of course, Mr. Kenyon's 14.

17 Now, did he have his eyes wide open at
18 age 14 when he started smoking Camel
19 cigarettes and they had the big billboard up
20 in Times Square and it was blowing out that
21 big smoke ring? And sure, there was peer
22 pressure.

23 Why was there peer pressure? They
24 spent millions of dollars advertising. They
25 had all the baseball players and all the movie 3772

1 stars and all the TV stars all talking about
2 cigarettes. People emulated those folks.
3 That's why they had celebrity endorsements
4 back then. That was criticized. Eventually,
5 it was stopped.

6 MS. PARKER: Your Honor, objection, no
7 evidence.

8 THE COURT: Just argue the evidence,
9 Mr. Acosta.

10 MR. ACOSTA: Just trying to stick to
11 the evidence as best I can, Judge.

12 You know -- and they talked about
13 benzo[a]pyrene, benzo[a]pyrene,
14 benzo[a]pyrene. Well, there were a number of
15 carcinogens. Well, they say, "Well, that was
16 in Reader's Digest." If you remember, I read
17 part of that Reader's Digest article. It
18 didn't say benzo[a]pyrene was a carcinogen.
19 Reader's Digest didn't know, didn't say that.

20 I've got that article right here. It
21 didn't say that.

22 This is that same article that was read
23 to you -- it was in evidence -- that showed
24 that back in the -- this is from 1957 -- that
25 the Reynolds filter cigarettes had more tar 3773

1 and nicotine in them than Camel. I guess if
2 anybody read this, they would say, "Oh, why
3 should I switch to a filter if the filter's
4 got more tar and nicotine in it," if they knew
5 what that meant, if they happened to read
6 this.

7 You know, one out of 300 articles in

8 Reader's Digest that year -- Reader's Digest
9 didn't have any duty to warn. These
10 agencies -- the National Cancer Institute, the
11 American Cancer Association, the American
12 Medical Association -- it wasn't their job to
13 warn. It's Reynolds that had the duty to
14 warn. That's what the jury instructions say.
15 Reynolds had the duty to warn.

16 MS. PARKER: Objection, Your Honor.
17 Misstates the charge.

18 THE COURT: Well, overruled.
19 Ladies and gentlemen, I'll read the
20 instructions of law at the conclusion of the
21 case.

22 You may continue, Mr. Acosta.

23 MR. ACOSTA: Reynolds is the expert.
24 They're the ones that have the duty to warn in
25 this case. That's why they're here, because

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1 they didn't do it. And they tried to excuse
2 that through all these contrivances. In fact,
3 they basically deny everything -- everything
4 in this case.

5 And I do want to say this: That
6 when -- I read from a document. Although I'm
7 speaking -- and the arguments and what I'm
8 saying in argument right now and what I said
9 in opening statement and what I said during
10 jury selection, that's not evidence; but when
11 I read the evidence to you, the stuff I read
12 is the evidence. That is evidence for you to
13 consider.

14 Those documents that we put up there,
15 that was evidence for you to consider, and
16 Reynolds did have secret documents. They've
17 got "secret" or "confidential" stamped on 'em.
18 I think you saw that. They had secrets, and
19 the secret stuff was primarily about nicotine,
20 because they knew what a drug it was. They --
21 they knew -- that that's the thing they really
22 wanted to keep quiet, was how important
23 nicotine was to their business.

24 And how would they keep smokers smoking
25 when they knew that most smokers -- they knew

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1 that most of them, long-term smokers, wished
2 they hadn't started, wished they could quit.
3 They had one document called -- where the
4 "exit gait" is termed by Dr. Teague. "You
5 know, if the exit gait ever opens, we'll go
6 out of business. How are we going to keep
7 ourselves from doing that? We've got to keep
8 people smoking. That's how we're going to do
9 it, and we're going to stay in this
10 conventional cigarette business just as long
11 as we can."

12 And, I mean, virtually everything that
13 we have brought forward to you in this case
14 has been disputed. I mean, I just heard a few
15 minutes ago that one of those documents
16 dealing with whether or not it was feasible --
17 those drawings of the alternative cigarette
18 products back in -- this was '68, '69. The

19 document is dated '69; but if you read the
20 document, Dr. Teague said he started thinking
21 about it in '68 to put down his thoughts.
22 Well, that particular document -- right
23 at the bottom (pointing) it says, "preliminary
24 laboratory and concept studies indicate that
25 the proposed new products are technically

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1 feasible." I didn't make that up. That's
2 what the document says. There's a lot to
3 read. I don't know how anybody could read all
4 that stuff. But there are a lot of documents.

5 And the business about alternative
6 products and designs and all that stuff, well,
7 what did Premier and Eclipse have to do with
8 this case? Why -- why was there all that
9 testimony from Reynolds about Premier and
10 Eclipse cigarettes? What relevance does that
11 have to Mr. Kenyon in this case? You can ask
12 yourselves that. So, that comes into evidence
13 and at least it's just a big red herring.

14 You'll get to read these jury
15 instructions, and you're going to see that a
16 product if it's unreasonably dangerous and Dr.
17 Townsend admitted cigarettes were inherently
18 dangerous and that they were not safe for the
19 use intended by the manufacturer, by Reynolds.
20 Not safe for their intended use.

21 Without a warning, they're defective.
22 And there was no warning from Reynolds. The
23 manufacturer that made the product.

24 Now, if you go back into the -- into
25 the 1950s time frame -- and this is why this

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1 Frank Statement is sort of an important
2 document. Reynolds not only -- they didn't
3 just sit back and do nothing, they took
4 affirmative steps to get out the message to
5 the public that it was safe to smoke.

6 And it would be one thing if they
7 didn't say anything, but people knew the
8 message back then. Mr. Kenyon remembered the
9 message, he testified he remembered that. He
10 knew that Reynolds had indicated that it was
11 safe. He just couldn't remember reading this
12 exact document. Because there's -- you get
13 shown all these documents. You can't remember
14 if you read this headline or that headline.
15 So you just say, wow, I read a lot of
16 headlines. But it wasn't convinced that
17 cigarettes caused cancer.

18 Like -- and this is ones she didn't
19 show you a little while ago. Remember,
20 Dr. Ford put that on that plasma screen. And
21 this was a pie chart that showed by 50 percent
22 thought that cigarette was one of the causes
23 of cancer, but -- we had a lot of debate over
24 this, but 24 to 26 percent, that's
25 50 percent -- didn't. No matter how you look

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1 at it, 50 percent didn't believe it.

2 And that was everybody. And then we
3 went through a bunch of Gallup polls, and the

4 Gallup polls, all the way through the '50s and
5 60s showed that among smokers it was somewhere
6 between 33 -- 38 percent. The majority of
7 smokers back then didn't believe that
8 cigarettes caused cancer, and then I showed
9 you the Roper poll and some other polls that
10 cigarette companies did.

11 Those people, most of them didn't
12 believe that cigarettes were a cause of cancer
13 back then. The cigarette companies had taken
14 the position it wasn't proven and they
15 advertised and put in all these ads that
16 imply. I mean, think about the Salem
17 springtime ads. They're in this pristine pure
18 environment with these really lovely healthy
19 young people smoking cigarettes with
20 statements underneath like -- like Salem
21 refreshes, like they're soothing and
22 comforting to smoke. That's the kind of
23 message that was going out. That's the kind
24 of message that Reynolds put out to keep
25 people doing it.

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1 And it overcame -- it overcame what was
2 said in the press even though admittedly -- in
3 the articles that were in the press there was
4 lots of times statements from cigarette
5 companies saying, "Oh, but it hasn't been
6 proven or mice aren't men or some other kind
7 of statement used to camouflage the
8 information.

9 MS. PARKER: Objection, Your Honor. No
10 evidence.

11 THE COURT: I'll overrule. Ladies and
12 gentlemen, you're to use your own memory in
13 relying on the evidence.

14 You may continue.

15 MR. ACOSTA: You may remember a
16 question that was asked, I believe, of a
17 couple of the defense witnesses from the 1979
18 Surgeon General's report that the information
19 in '79 demolished -- they used the word
20 "demolished" the cigarette company's claims
21 made during the last 15 -- for 15 years and
22 now. And they said that it demolished the
23 cigarette company's empty claims that 15 years
24 ago and today that no link existed between
25 cigarette smoking and cancer and that it was

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1 empty then and utterly vacuous now.

2 MS. PARKER: Objection, Your Honor.
3 Pre-empted, 1979.

4 THE COURT: I'll overrule. Once again,
5 use your own memory, ladies and gentlemen.

6 MR. ACOSTA: It's real interesting
7 that -- when you try to get Dr. Townsend to
8 admit on the witness stand when it was that
9 Reynolds first admitted that cigarettes cause
10 cancer, got a bunch of mumbo-jumbo. Was it
11 just this last year, was it ten years ago,
12 when was it that Reynolds took that position?

13 You know, in 1984 there's a document in
14 evidence that says can we have an open debate

15 about smoking? Still a lot of questions out
16 there. Nobody knows. That was the way
17 Reynolds had over the years held its -- its
18 market by making people think that there's
19 still this open question about smoking
20 cigarette.

21 MS. PARKER: Objection, no evidence.

22 THE COURT: I'll overrule. Once again,
23 use your own memory, ladies and gentlemen.

24 MR. ACOSTA: If I -- I can show you the
25 open statement right here. Take me just a
3781

1 little second to find it, but it's there. You
2 might remember seeing this. It's in evidence.
3 "Can we have an open debate about smoking."
4 Up in that upper right-hand corner, it says
5 Reynolds, 1984 -- 1980. So, maybe that's why
6 Dr. Townsend said 1980.

7 But in any event, back in the 1950s and
8 the 1960s, Reynolds did not tell anybody what
9 it knew, what it had learned to verify at all
10 what the sort of floating around in the
11 atmosphere. Would a reasonable person need to
12 know what Reynolds knew? Well, they would --

13 MS. PARKER: Objection, Your Honor.
14 Misstates the charge.

15 THE COURT: You'll receive the
16 instruction of law from me at the conclusion,
17 ladies and gentlemen.

18 Continue, Mr. Acosta.

19 MR. ACOSTA: Thank you, Judge.

20 Would a reasonable -- would a
21 reasonable person need to have information
22 from Reynolds to make good decisions? We know
23 that most didn't believe that cigarettes
24 caused cancer.

25 Most smokers didn't believe it.
3782

1 Wouldn't something from Reynolds have made a
2 difference to people that were saying, well, I
3 heard this? What do I do? Should I -- should
4 I try to stop smoking now or what? Reynolds
5 didn't tell anybody how to try to stop smoking
6 or what they could do or anything of that
7 nature. No, they wanted the smoker to keep
8 smoking just as they intended, just as
9 Reynolds intended, them to do.

10 And that's what smokers did. They
11 smoked as Reynolds wanted them to. And now,
12 they come in and they say shouldn't have
13 ignored it. Shouldn't have ignored the
14 headlines or whatever. Should have quit
15 smoking back then.

16 They blame the victim. The defendant
17 comes in and blames the victim for not doing
18 something which actually the defendant wanted
19 'em to do. Reynolds wanted Mr. Kenyon to keep
20 smoking Camels. Didn't do anything to
21 discourage him from smoking Camels. Didn't
22 lift the slightest little finger to encourage
23 Mr. Kenyon not to smoke Camels.

24 So, Mr. Kenyon's choices were, "Well,
25 do I believe what I read in the newspaper or

1 do I believe what the manufacturer says about
2 cigarettes?" that was his choice. Then the
3 second part of it is, "Well, how able am I to
4 stop doing this?" And For him, it was very
5 difficult.

6 Now, there's some discussion about --
7 Dr. Goldman reviewed his entire medical chart
8 and you'll have that back in the jury room.
9 It's in three big volumes, it's massive. He
10 reviewed all that stuff. No risk factors for
11 lung cancer for Mr. Kenyon other than
12 cigarette smoking. And he testified as to
13 that. There were no other risk factors.

14 Now, a risk factor, that's another red
15 herring in this case, because this -- this
16 risk reduction and all that, that's just a big
17 red herring, because if you get it, it's no
18 longer a risk. The reducing risk idea comes
19 at the front end, not at the back end.

20 If you're -- it doesn't make any
21 difference if your risk goes down if you get
22 the disease. It's caused by the agent that
23 causes the disease. If you're half as likely
24 to get it, you still get it, that doesn't
25 change causation.

1 And Reynolds could have brought a
2 doctor in here. They could have brought a
3 legitimate medical doctor in here. Ask
4 yourselves, is there a legitimate doctor going
5 to come and in say Mr. Kenyon's lung cancer
6 and his emphysema weren't caused by cigarette
7 smoking, it didn't happen.

8 I suggest to you that a legitimate
9 doctor wouldn't do that. The legitimate
10 doctor's said that cigarettes caused his lung
11 cancer. Cigarettes causes emphysema and
12 they're trying to slip and slide around and
13 deny that with some guy that got paid
14 \$4 million to his -- to he and his wife's
15 company over the last 20 years doing special
16 testimony, studying for Reynolds.

17 You -- you know, you can -- you're the
18 judges of these people, but there was no
19 medical doctor that came in here, and this is
20 an issue of medicine. Causation. Medical --
21 to suggest that medical doctors don't care
22 what causes disease is crazy. That's what
23 they do. That's how -- that's how diseases
24 are determined and cured, by what medical
25 doctors do. That's what Dr. Williams --

1 there's no scientific dispute about cigarettes
2 causing cancer. But in this case, you've got
3 to remember that there may not be an absolute
4 scientific proof like some kind of special DNA
5 test or a fingerprint, but if you look at the
6 probabilities, the probabilities are so
7 great -- it's -- the chance that he would have
8 gotten both emphysema and lung cancer from
9 something else is astronomically low. That's
10 why no doctor came in here to testify that his

11 cancer wasn't caused by cigarettes. And of
12 course, the only cigarettes he smoked were
13 Reynolds cigarettes.

14 The second thing that they suggest is,
15 well, maybe he should have tried a lower-tar
16 cigarette or something like that. Well, if --
17 that's kind of like saying -- it's kind of
18 like saying -- it's kind of like saying, well
19 the guy that bought the Ford Pinto, deserved
20 what he could got, because he could have
21 bought a Ford station wagon instead. Or he
22 could have bought Volvo or he could have
23 bought something else.

24 They didn't do anything to make the
25 Camel and Salem Mr. Kenyon smoked safe enough.

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1 It might have made it a little safer, but as I
2 mentioned, when they first came out with it,
3 Salem had more tar and nicotine than the
4 Camel. He did switch to Salem in 1972.

5 Now, Ms. Parker made a statement to you
6 about one of the documents that set the level.
7 There's no question that Reynolds sets the
8 level of nicotine in the cigarette. They set
9 it to whatever amount they desire. And some
10 cigarette packages contain a little label that
11 tells you how much's in them. All the
12 cigarettes in the pack have the same amount.
13 They don't have a whole bunch in one cigarette
14 and a little bit in another cigarette. They
15 process it, and they make it that way as part
16 of the design of the cigarette.

17 Dr. Goldman says; yeah, they could take
18 the -- the -- they could have made one -- in a
19 non-addicting level, that would be a cigarette
20 that could have been done back then. The
21 thing is that they didn't do it, and they kept
22 the level in the Camel and the Salem way up
23 there.

24 Now, he's trying to quit by the time he
25 switches to Salem. He starts trying to quit

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1 in the late 1960s, and he continued. I mean,
2 he tried to quit many times he testified,
3 until 1982. And I showed you some -- some --
4 this business about the smoking history is
5 another red herring. Now, even -- I mean,
6 there are medical records before and after the
7 lawsuit. They go all different directions.

8 And again, I mean, it's real so -- it
9 has really nothing to do with the true issues
10 in this case. Because the doctors, the
11 treating doctors that talked to him and saw
12 him before he brought a lawsuit, before, said
13 that the history that he had given of his
14 smoking causes lung cancer.

15 So, you know, trying to be absolutely
16 as accurate as he could in admitting that he
17 continued to smoke cigarettes was good. He --
18 again, he's -- it's not a time to when you're
19 put under oath when you're answering questions
20 to make something up.

21 You know, it's difficult, and it's

22 difficult -- it's difficult enough no for the
23 average person, but when you're 73 years old
24 and you've got lung cancer, and you've got
25 emphysema and you're on oxygen -- and if you 3788

1 look at the blood gas levels on -- he's got
2 very low oxygen level in his blood. It's
3 called hypoxia. You don't think so good.
4 It's like going way in altitude.
5 MS. PARKER: Objection, Your Honor.
6 MR. ACOSTA: It's like going way up in
7 altitude.

8 THE COURT: I'll overrule.
9 MR. ACOSTA: You don't think so. And
10 he's had brain radiation.

11 So, yes, there were mistakes made. But
12 you judge for yourself whether Mr. Kenyon has
13 come in here to try to pull the wool over your
14 eyes. Judge for yourself whether there is
15 anything but the most noble purpose here.
16 You're the judges of that.

17 Ms. Parker asked me to answer a
18 question. "what possible warning could
19 Reynolds have given?" Well, if you remember
20 what Dr. Rodgman said, this could have gone
21 right on the back of the package of
22 cigarettes. The evidence against smoking is
23 overwhelming. The evidence the other way is
24 scant. In other words, they knew --
25 Dr. Rodgman's own statement that the evidence

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1 demonstrating cigarettes caused cancer was
2 overwhelming. They could have put that on the
3 package. They could have put it on the
4 package insert, inside the package. They
5 could have put it on their advertisement.
6 They could have put it on the Salem ads that
7 we saw.

8 The over -- the evidence that
9 cigarettes caused cancer is overwhelming.
10 Sure, that could have gone on there, but it
11 didn't.

12 Now, wouldn't that have made a
13 difference? Wouldn't that have made a
14 difference if Reynolds back in the early '60s
15 or back in 1954 instead of the Frank Statement
16 saying, we don't believe that cigarettes are
17 injurious to your health or there's no proof,
18 which was certainly contrary to the thing that
19 Dr. Teague, their own doctor, had determined.
20 It was absolutely 180 degrees contrary to
21 that.

22 And Dr. Rodgman finds all these
23 chemicals and says "we need to take them out.
24 And they're carcinogens." Sure, there was
25 plenty they could have put on cigarette

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1 package back in 1954 right after he got out of
2 the Marines, you know, when he was a young
3 man.

4 And how many others would that have
5 affected? No one will ever know, but surely
6 this that is the kind of thing that Reynolds

7 tried not to do. Instead, they wanted people
8 to keep smoking.
9 See, because they knew that a warning
10 like that would have a big impact on the sale
11 of their cigarettes.
12 MS. PARKER: Objection, Your Honor. No
13 evidence.
14 THE COURT: I'll overrule. Ladies and
15 gentlemen, use your own memory.
16 MR. ACOSTA: It's fair argument that
17 they spent millions and millions of dollars
18 advertising. So that they could keep selling
19 their cigarettes. If they were telling people
20 that cigarettes caused cancer, what would
21 happen? People wouldn't smoke 'em. They'd
22 lose money. That's the deal. That's common
23 sense. That's absolutely common sense.
24 This -- the causation like everything
25 else, just has to be determined in what you
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1 think is most probable. Like everything else,
2 it's just one little grain of sand on that
3 sail, and that's it. So, what's most
4 probable? Well, we know that the sales kept
5 going up. If it was so much common knowledge,
6 then why would that happen? Because people
7 didn't believe. They didn't believe it back
8 then.
9 They believed Gary Moore, and they
10 believed all the other TV personalities that
11 just kept smoking.
12 Now, Ms. Parker -- I want to try to
13 figure out which little statement I need to
14 make to you to stop, because I'm just about
15 ready to do that. Before I do, there were two
16 other Reader's Digest articles that are in
17 evidence. And in -- and you remember that she
18 mentioned something about the AMA, and the AMA
19 recommended that we don't think warnings are
20 necessary." Well, remember, the AMA just a
21 couple of weeks before had gotten ten million
22 dollars to do research for ten years or
23 something like that, from the tobacco
24 companies.
25 But there was evidence from the witness
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1 stand and from Reader's Digest that -- and --
2 that the Federal Trade Commission disagreed.
3 Congress disagreed. Said, "No. A warning is
4 necessary. That's why they put the caution
5 label on it." They disagreed with some of
6 these agencies. Disagreed with Reynolds, and
7 I -- I read something that I think bears
8 repeating from two of these Reader's Digest
9 articles. One's from October, 1963. And this
10 is what was read to you. "The scientists
11 noted that since 1950 when the first evidence
12 appeared linking cigarette smoking with lung
13 cancer, little action has been taken".
14 Well, that would sort of suggest that
15 nobody had done it. And it says; "a
16 conservative estimate of the price of this
17 delay is a quarter of a million unnecessary

18 deaths and the accompanying suffering and
19 economic loss. This delay is not
20 happenstance. This delay -- the tobacco
21 industry has" -- let me read this again.
22 "This delay is not happenstance. The tobacco
23 industry --
24 MS. PARKER: Objection, Your Honor.
25 Noerr-Pennington.

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1 THE COURT: I'll overrule.
2 MR. ACOSTA: "That this delay is not
3 happenstance. The tobacco industry has
4 mounted a well organized and well financed
5 public relations campaign. The industry
6 experts have developed obfuscation and special
7 pleading into a fine art."
8 That was in Reader's Digest.
9 And so is this in 1964: "The tobacco
10 industry, for more than ten years, has
11 demanded research as a delaying tactic against
12 every authoritative study of cigarettes and
13 disease, but from now on, its propaganda,
14 aimed at confusing or beguiling the public,
15 will be subordinated to high-pressure politics
16 openly or behind the scenes, the battle will
17 be waged on Capitol Hill." And then it goes
18 on to discuss the --
19 MS. PARKER: Objection, Your Honor.
20 Same objection.
21 THE COURT: Overruled.
22 MR. ACOSTA: These are in evidence.
23 THE COURT: I'll overrule, Ms. Parker.
24 MR. ACOSTA: And then it goes on to
25 discuss the FTC. You can read those Reader's

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1 Digest articles if you can find them. But
2 those are mid-1960s, because that is what
3 happened.
4 And I want to close with one -- one
5 example of this common knowledge business.
6 She mentioned hot coffee that people know that
7 you don't need to be warned when you buy a
8 coffee, it's hot. But what if the coffee had
9 potent carcinogens in it, you need to be
10 warned about that. You might know that it's
11 hot, that it would spill on you and burn you.
12 That might be common knowledge, but if it had
13 potent carcinogens in it, you would expect the
14 people that made it to tell you.
15 And as I said at the beginning, if
16 Reynolds contributed to this, if Reynolds was
17 a contributory factor to this and was a
18 substantial contributing cause or one of the
19 other -- or one of many causes, a cause for
20 Mr. Kenyon's cancer, and you should mark yes
21 in the appropriate boxes. And you can compare
22 those instructions with things that you know,
23 the things that you've heard, with all these
24 documents, with your own common sense, with
25 the stuff that you bring into this courtroom,

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1 and do what juries do, and decide this case.
2 We appreciate your attention, and

3 that's all I have to say.
4 Thank you very much.
5 THE COURT: Thank you, Mr. Acosta.
6 Ladies and gentlemen, if you'll excuse
7 me for a minute, I'll speak with Ms. Parker
8 and Mr. Acosta for just a second.
9 MR. ACOSTA: May I take this down now?
10 THE COURT: You may.
11 (Thereupon, the following bench
12 conference was had:)
13 THE COURT: I was going to send them
14 home at five anyway. Normally I would just
15 read the instructions to tomorrow. Do you
16 want them read today or just -- is there any
17 preference by counsel?
18 MR. ACOSTA: It might be better
19 tomorrow. They're tired. Everybody's tired.
20 THE COURT: Well, my normal procedure
21 is if I send home, I read them in the morning.
22 So, I'll go ahead and do that.
23 (Thereupon, the bench conference was
24 concluded.)
25 THE COURT: All right, ladies and
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1 gentlemen, it will be -- it will probably take
2 me about a half hour to read the instructions,
3 because we've had a long day, we will -- I
4 will read them to you in the morning. I know
5 that will be a good way to start your morning
6 tomorrow morning. And after that, you'll have
7 an opportunity to deliberate.
8 Until I read the instructions to you,
9 the case is not yours to start deliberating.
10 So do not discuss the case with anyone.
11 Tomorrow you'll get a chance to start your
12 deliberations and I'll see you at 9:00
13 tomorrow.
14 Thank you.
15 (Thereupon, the jury exited the
16 courtroom.)
17 THE COURT: Before we -- you may be
18 seated. I'm sorry.
19 Before we conclude, I do want to send
20 some of the exhibits back. Have y'all had a
21 chance to look through the exhibits that will
22 be going back to the jury room?
23 MS. PARKER: Yes, Your Honor.
24 THE COURT: Mr. Acosta, have you had a
25 chance to look through them?
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1 MR. ACOSTA: I haven't done that.
2 Maybe we can do that in the next 15 minutes or
3 so.
4 THE COURT: That's fine. I just want
5 to send them back to the jury room, so that
6 when I send them back to deliberate tomorrow,
7 the exhibits will be back there waiting for
8 them.
9 So if you'll do that with Mr. Jones;
10 and then Mr. Jones can take care of that.
11 MR. ACOSTA: The ones that were
12 supposed to be checked, are those the ones
13 that had the sheet added?

14 THE COURT: You can do that -- you can
15 check through all of them, if you want. I'm
16 giving you an opportunity to look through the
17 exhibits that Mr. Jones will be sending back
18 at this point, if you care to do that.
19 And, Ms. Parker, you have the same
20 opportunity.
21 MS. PARKER: Thank you, Your Honor.
22 THE COURT: Anything further,
23 Mr. Acosta?
24 MR. ACOSTA: No, Your Honor.
25 THE COURT: Ms. Parker, anything

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1 further?
2 MS. PARKER: No, Your Honor. Just to
3 let you know we have do copies of the charges
4 and all for tomorrow. Do you want us to hold
5 on to them?
6 THE COURT: I've got them, too.
7 My assistant J.A. made copies of the
8 charges, but we do have copies to send back,
9 we'll give them while I read it. So, if
10 there's nothing further, look at the exhibits,
11 we'll be in recess until 9:00.
12 (Thereupon, a recess was had at
13 4:25 p.m.)

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1 COURT REPORTER'S CERTIFICATE
2
3 STATE OF FLORIDA)
4 CIRCUIT OF HILLSBOROUGH)
5
6 I, SHERRILL LYNN JACKSON, Court Reporter for
7 the 13th Judicial Circuit of the State of Florida, in
8 and for Hillsborough County,
9 DO HEREBY CERTIFY that I was authorized to
10 and did report in shorthand the proceedings and evidence
11 in the above-styled cause, as stated in the caption
12 hereto, and that the foregoing pages numbered 3673 to
13 3799, inclusive, constitute a true and correct
14 transcription of my shorthand report of said
15 proceedings and evidence.
16 Dated this 10th day of December, 2001.
17

18 Sherrill Lynn Jackson, RPR
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